KENTUCKY JUSTICE CABINET

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LEGAL UPDATE

2001 – 2002

Rev. 9/02

NOTES: While many of these cases involved multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in this update. Readers are encouraged to discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions are not discussed, nor are cases that are not final at the time of printing. When relevant opinions are finalized, they will be included in future updates.

All quotes not otherwise cited are from the case under discussion.

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TABLE OF CASES / INDEX
(in order of entry in this update)

TABLE OF CASES (in alphabetical order)

United States Supreme Court
2001-02 Term

CASE SUMMARIES

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U.S. v. Knights, 534 U.S. 112 (2001)

FACTS: Mark Knights was sentenced to summary probation for a drug offense by a California court. The probation order subjected Knights to the possibility of warrantless search at any time, by any probation or law enforcement officer. Knights agreed to this provision.

During that time, Knights (and a friend, Simoneau) became the primary suspects in a series of vandalism and arson incidents against Pacific Gas & Electric that eventually totaled well over a million dollars in damage. Det. Hancock of the Napa County Sheriff's Department had noticed a correlation between the date of Knights' court appearance on the charge of theft of PG&E services and the incidents of vandalism. He and his friend had also been stopped near a PG&E line, in possession of gasoline. Immediately after a major arson fire at a PG&E location, Det. Hancock began a surveillance of Knights' residence, and at the time, Simoneau's truck was parked in front. At about 3 a.m., Simoneau emerged carrying three cylindrical objects, which Det. Hancock believed were pipe bombs. Simoneau walked across the street to the Napa River and Hancock heard three splashes, and Simoneau returned without the objects. He then drove a distance away, parked in a driveway, and walked away. Hancock entered the driveway and observed, in the truck, a Molotov cocktail, explosive materials, a gasoline can and two brass padlocks that fit the description of those removed from a PG&E transformer vault that had been damaged. Det. Hancock then decided to return and search Knights' residence, since he was aware of the provisions of Knights' probation.

During the search of Knights' residence, Hancock found detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia and another brass padlock, stamped "PG".

Knights was arrested and charged on a variety of charges. Knights' moved for suppression of the evidence found during the search. The District Court granted the suppression on the basis of the search being investigatory rather than for probationary purposes. The Ninth Court of Appeals affirmed this decision. The California Supreme Court had rejected the distinction and had consistently upheld such searches.

ISSUE: Are search conditions placed upon probationers limited to searches with a probationary purpose?

HOLDING: No

DISCUSSION: The Court stated, "there are dual concerns with a probationer." The first is "the hope that he will successfully complete probation and be integrated into the community." The second reason, however, is the legitimate concern that the probationer "will be more likely to engage in criminal conduct than an ordinary member of the community." The Court concluded that all that is required is that there is a "degree of individualized suspicion" that there is a "sufficiently high probability that criminal conduct is occurring…." While "the Fourth

Amendment ordinarily requires the degree of probability embodied in the term probable cause, a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable," such as in the case of probationers, who have a "significantly diminished privacy interest." The same logic also led the Court to conclude that a warrant is unnecessary, when there is a diminished expectation of privacy.

The Court upheld the validity of the search.

U.S. v. Arvizu, 534.U.S. 266 (2002)

FACTS: Arvizu was stopped by Border Patrol Agent Stoddard at a checkpoint near the Arizona-Mexico border, north of the border town of Douglas, Arizona. Only two highways lead northward from Douglas. The checkpoint is located on Hwy 191. Agents work the checkpoint as well as rove the backcountry to locate illegal aliens that attempt to bypass the checkpoint. Electronic sensors in the area also help in locating illegal aliens.

On a day in January, 1998, Agent Stoddard received a report that a sensor on Leslie Canyon Road had triggered. This suggested that someone might be trying to circumvent the checkpoint. The time was also suspicious because it was a shift change, a fact he believed the alien smugglers knew. He headed toward the area, and received a report that another sensor in the area had also triggered. He continued on, and spotted another vehicle. The timing was such that he believed it was the vehicle that had tripped the sensors. He pulled to the side of the road to observe the vehicle.

The vehicle was a minivan, a type of vehicle often used by the smugglers. As it approached him, it slowed dramatically. Stoddard saw five occupants, an adult male and female in the front and three children in the back. The driver was very stiff, and appeared to be deliberately ignoring the Border Patrol vehicle. He also noted that the children in the very back seat appeared to have their feet on something on the floor. As the vehicle passed, Stoddard began to follow the vehicle. At one point, the children in the vehicle began to wave in an abnormal pattern, apparently under instruction, and the waving continued on and off for several minutes.

As they approached the Kuykendall Cut Road intersection, the driver signaled a turn, and then turned off the signal. In a few moments, the driver again turned on the signal and made an abrupt turn onto the side road. Stoddard found the turn significant because this was the last point where a vehicle could avoid the checkpoint, and because the road was not really suitable for the minivan; four-wheel-drive vehicles normally traversed the rough road.

Stoddard did not recognize the minivan as local traffic, and there were no picnicking or sightseeing grounds in the area where the minivan was heading. He requested information on the vehicle's registration, and learned that the registered address was in an area in Douglas known for alien and narcotic smuggling. At this point, he decided to make a vehicle stop. The driver, Arvizu, stopped, and Stoddard asked for permission to search the vehicle, which was granted. Stoddard found approximately 128 pounds of marijuana in the vehicle, including some in the duffel bag upon which the children's feet were resting.

Arvizu was convicted of intent to possess and distribute marijuana. The Court of Appeals reversed, holding that most of the factors relied upon by the District Court

"carried little to no weight in the reasonable-suspicion calculus" leaving insufficient factors upon which to base the stop.

ISSUE: Were there sufficient suspicious factors present to satisfy the reasonable suspicion standard for a Terry stop?

HOLDING: Yes

DISCUSSION: The Court held that officers (and the courts) must "look to the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." The Court went on to state that the "process allowed officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."

The Court examined the factors that were found wanting by the Circuit Court of Appeals, including, the timing, the type of vehicle (a minivan), the posture of the adult passengers, including their failure to acknowledge Stoddard's presence, the children's elevated knees, the odd waving of the children, the turnoff onto a rough road, and the address where the vehicle was registered. The Supreme Court found that while each of the factors questioned by the Court of Appeals might have been innocent in isolation, that "taken together, they warranted further investigation." In this situation, the Court found that Agent Stoddard's deductions from his observations and based upon his experience in the Border Patrol were reasonable and "sufficed to form a particularized and objective basis" for the stop of the vehicle.

The Court upheld the validity of the stop.

Thomas v. Chicago Park District, 534 U.S. 316 (2002)

FACTS: The Chicago Park District (CPR) is responsible for public parks and other public property in Chicago. In that capacity, the CPR enacted an ordinance requiring individuals obtain permits to conduct "a public assembly, parade, picnic, or other even involving more than fifty individuals, or engage in an activity such as creat[ing] or emit[ing] any Amplified Sound. The CPR has 14 days in which to grant or deny, and denials must be explained and are subject to revision/appeal.

Thomas and other petitioners have applied several times for permits for rallies supporting the legalization of marijuana. Some have been granted; others have been denied. Thomas appealed, stating that the permit provision was unconstitutional. Both lower courts granted summary judgment in favor of CPR.

ISSUE: May a jurisdiction require a permit for assemblages in a public place?

HOLDING: Yes

DISCUSSION: The Court discussed the concept of content-neutral "time, place and manner" restrictions on free expression. The ordinance in question, according to the Court, "furthers, rather than constricts, free speech" because the ordinance has enough of a permissive nature to allow the CPR to overlook inadequacies in the permit, as long as they "do no harm to the policies furthered by the application requirements."

The Court upheld the summary judgment award in favor of the CPR.

U.S. v. Drayton, 122 S.Ct. 2105 (2002)

FACTS: On February 4, 1999, Drayton and Brown were on a Greyhound bus from Ft. Lauderdale, Florida to Detroit, Michigan. The bus stopped in Tallahassee for the bus to be refueled and cleaned. The passengers were required to disembark. As they reboarded, the driver checked tickets and then left the bus to go into the terminal. As he left the bus, three Tallahassee police officers, in plainclothes but with visible badges, boarded the bus.

Onboard, Officer Hoover knelt on the driver's seat and faced the rear of the bus, where he could watch the passengers, but he did not obstruct the exit. Officers Lang and Blackburn went to the rear of the bus, and Officer Blackburn stayed there, facing forward. Lang worked his way forward, questioning passengers about their travel plans and matching passengers with luggage in the overhead racks. He did not block the aisle.

Lang testified that passengers that declined to cooperate were allowed to do so, but that most were cooperative. Some passengers even left the bus during the process, to make a purchase in the terminal or smoke a cigarette.

Drayton and Brown were seated next to each other, with Drayton on the aisle and Brown in the window seat. Lang displayed his badge and spoke to them in a low voice. Both claimed the same green bag in the overhead rack, and Brown agreed that the bag could be checked. Blackburn checked the bag and found no contraband.

Both Drayton and Brown were dressed in heavy jackets and baggy pants despite the warm weather. Lang asked Brown if he had weapons or drugs, and asked consent to search, which Brown allowed. Lang felt hard objects in the thigh pockets of the pants, and arrested Brown, turning him over to Hoover. He then asked Drayton's consent for a pat-down, and again found the same hard objects, and Drayton was also arrested. Eventually, the officers discovered packages taped into the men's underwear, with Brown having 3 bundles totaling 483 grams of cocaine and Drayton having 2 bundles totally 295 grams of cocaine.

Eventually both were charged. The District Court denied their request for suppression, but the Court of Appeals remanded the appeal with orders to grant the motions.

ISSUE: Is a search on a bus automatically coercive?

HOLDING: No

DISCUSSION: The Court equated the approach of the passengers on a bus to be similar to approaching individuals on the street and asking questions. Officers may ask consent even when they have no particularized suspicion about them. This case differed slightly from the Court's earlier case in Florida v. Bostick, in that Lang did not specifically tell the passengers they had a right to decline. The Court of Appeals stated what was effectively a per se rule, that ALL bus searches were inherently coercive, but the Supreme Court disagreed. The facts in this case indicate that the officers made every effort to make it a non-coercive encounter, and their failure to make a specific notification does not make it automatically coercive. In fact, even after arresting Brown, Lang asked for Drayton's consent before doing a pat-down.

The Court upheld the District Court's denial of the suppression motion.

Barnes v. Gorman, 122 S.Ct. 2097 (2002)

FACTS: Gorman is a paraplegic who lacks voluntary control of his lower torso and legs, and wears a catheter to empty his bladder into an attached urine bag.

In May, 1992, he was arrested for trespass after fighting with a bouncer at a Kansas City, Missouri, nightclub. While waiting for police transport, he requested and was denied permission to visit the restroom to empty the urine bag. When the transport van arrived, it was not equipped to secure a wheelchair. Over Gorman's objections, the officers removed him from his wheelchair and used a seatbelt and Gorman's own belt to secure him to a narrow bench in the van. Gorman managed to release the seatbelt, fearing it placed too much pressure on the urine bag. The other belt came loose and Gorman fell to the floor, rupturing the bag and causing shoulder and back injuries. The driver of the van was unable to lift Gorman, so he fastened him to a support for the remainder of the trip.

When they arrived at the station, Gorman was booked and released, and was eventually convicted of misdemeanor trespass. He suffers from a variety of medical problems as a result that prevent him from working full-time, something he had been doing previously.

A trial jury found the Kansas City police department liable under the Americans with Disabilities Act, because they failed to have adequate policies in place for the transport of individuals in a similar situation. They awarded both compensatory and punitive damages, but the District Court disallowed the punitive damages award. The Court of Appeals restored the punitive damages award.

ISSUE: May punitive damages be awarded in ADA and Rehabilitation Act cases?

HOLDING: No

DISCUSSION: The Court discussed similar federal statutes that do, and do not, allow punitive damage awards, and concluded that these acts are more analogous to those that do not allow punitives.

The Court overturned the Court of Appeals and denied punitive damages.

NOTE: While the issue in this case is not necessarily relevant to law enforcement agencies, this case is included because of the potential liability agencies face in transporting prisoners with various physical disabilities.

Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 122 S.Ct. 2080 (2002)

FACTS: Watchtower Bible & Tract Society coordinates the activities of Jehovah's Witnesses through the United States and publishes religious materials to be distributed. The local congregation involved in this case offers religious literature but does not request payment, although they do accept donations.

The Village of Stratton, Ohio, enacted an ordinance that prohibited uninvited peddling and solicitation on private property. However, potential solicitors could obtain a free permit, a permit that is routinely issued upon completion of a detailed application. Canvassers must then carry the permit with them and exhibit it when asked. Instead of applying for a permit, Watchtower sued, stating this was a violation of First Amendment rights. (Residents could also complete a "No Solicitation Registration

Form" that was specific to their property, and would then post a "No Soliciting" sign. Although Jehovah's Witnesses do not consider themselves to be solicitors, they agreed they do honor No Solicitation signs.)

The Jehovah's Witnesses objected to the permit on several grounds, including religious. One particular ground was that it required them to reveal their identities by obtaining the permit and showing it.

The District Court held most of the ordinance to be valid, content-neutral regulations. The Village agreed to narrow several provisions that were originally unacceptable to the District Court. The modified ordinance was held to be constitutionally valid. The Court of Appeals affirmed.

ISSUE: Does a local ordinance that requires a permit, which displays one's name, before door-to-door canvassing violate the First Amendment?

HOLDING: Yes

DISCUSSION: The Court addressed several concerns with the permit requirement: the surrender of anonymity, the imposition of such a requirement on individuals whose religious or other belief prevents them from applying for a license and the suppression of spontaneous speech. The Court also objected to the Village's stated reason for the permit requirement, because it goes beyond commercial transactions into the field of political and religious contacts. Those with criminal intent may easily circumvent the permit requirement by instead posing as a lost traveler, needing directions or a telephone. Finally, the unwelcome visitors can more easily be staved off with the posting of a sign, and the Court stated that the "annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit."

The Court held that the ordinance was unconstitutional.

Kentucky Court of Appeals / Supreme Court 2001 – Present

Case Summaries

Wilson v. Comm.
37 S.W.3d 745 (Ky. 2001)

FACTS: In 1989, Bardstown police officers found a small notebook in a wrecked vehicle, owned by a suspected drug trafficker. The notebook had a quantity of information about the trafficking, including information on Shelley Wilson, the defendant in this case. The notebook was shared with the Nelson County P.D., who eventually shared it with Det. Tim Royse, of Metro Narcotics (Louisville/Jefferson County).

In 1992, the information was used in a major drug trafficking investigation. Royse obtained a grand jury subpoena to get telephone records from the numbers found in the book, and from that, they learned Wilson's identity and that she had made a number of incriminating long-distance calls. Later, the police received a complaint about Wilson's drug dealing, and also received an anonymous tip about her. They began surveillance, and documented a number of visits consistent with drug trafficking.

Eventually, on November 12, Royse spotted Wilson in a minor traffic infraction. He stopped her. While she was searching for her license, he saw rolling papers in her purse. He told her she was the subject of a drug investigation and asked her if she would come to Metro Narcotics for questioning. She agreed. During the questioning, she agreed he used marijuana, and when asked about dealing, she stated "nothing you would be interested in."

Royse obtained a search warrant for her residence, detailing the investigation to that time. The search resulted in a seizure of 15 pounds of marijuana. Eventually, when Wilson (and others) learned that the officers had gotten telephone records, although they were not submitted to the grand jury before the subpoenas were issued, and they moved to suppress, which was granted by the trial court. The Court of Appeals overturned the suppression, and Wilson appealed.

ISSUE: May evidence located both through legal and illegal means be admitted in court?

HOLDING: Yes

DISCUSSION: The Exclusionary Rule states that evidence that is "derivative of the original illegality, i.e., is 'tainted' or is the proverbial "fruit of the poisonous tree.'" However, if the information is obtained from either independent or "causally remote sources, it make be admitted." In this situation, the Court found that the trail leading to Wilson came from two directions, one the illegally obtained information (concerning the long-distance calls, not her identity) and the second, the complaint and the tip. Since the second was sufficient to have placed her under suspicion, the court found that the telephone record information was, at worst, harmless error.

The Court of Appeals ruling was upheld.

Bowling v. Brandenburg
37 S.W.3d 785 (Ky. App., 2001)

FACTS: On December 16, 1998, the Berea P.D. received a 911 telephone call, seeking help, from Kenneth Lawson, Bowling's grandson. He stated that Bowling had threatened to kill his wife, Lawson (the caller) and other members of his family. An officer

was dispatched to Bowling's home, and Bowling and his wife both assured the officer that there was "no problem." The officer took no further action.

Two days later, Bowling requested a copy of the tape, and a written record of the call. Chief Brandenburg (Berea P.D.) provided the second, but refused the first. In response to a written Open Records request shortly afterward, Brandenburg formally refused the request.

Bowling filed this action to gain access to the tape, claiming that since the call pertained to him, he was entitled. His request was denied by the Circuit Court, and he appealed.

ISSUE: May 911 tapes be withheld from Open Records requestors?

HOLDING: Yes, in some circumstances.

DISCUSSION: The Court determined that the tape was exempt from disclosure, because the caller's right to privacy was "not outweighed by the public's right to information." The Court stated that callers seeking police assistance have a legitimate right to such privacy. The Court upheld the refusal to release the tape.

City of Florence, Ky v. Chipman
38 S.W.3d 387 (2001)

FACTS: On February 19, 1994, Conni Black, her boyfriend Steve Kritis and Susan Stemler were all at a local tavern. During the evening, Kritis assaulted Black, and she left with Stemler, whom she had just met. Kritis pursued the women and eventually, they all met up with local police.

Officer Wince, of the Florence P.D., was with other officers at the scene. Stemler was arrested for DUI. Boone County Deputy Sheriff Reuthe determined that Kritis was not intoxicated. Reuthe told another officer, Lt. Dusing (Florence P.D.) that Kritis had stated that Stemler, a lesbian, had kidnapped his girlfriend, Black.

A witness to the pursuit (before the police became involved) stated that the officers had arrested the wrong person (Stemler) and that Kritis was "crazy."

During the discussion, Black remained in Stemler's car. Lt. Dusing told Officer Dolan to arrest Black for Public Intoxication unless she decided to leave with Kritis. (However, apparently Black was not aware of this.) She agreed to go with Kritis, and Dolan believed she was competent to make the decision. She got out of the car and got into Kritis' car, without assistance.

As Kritis drove away, he later testified, Black began to argue and physically assault him. He lost control of the vehicle, and in the ensuing collision, Black was partially ejected and killed. Kritis was later found to be legally intoxicated.

The case comes before the state court on a claim that the officers were negligent. The lower court initially gave the officers summary judgment, which was reversed by the Court of Appeals.

ISSUE: Do officers have a legal duty to protect citizens who are not in custody?

HOLDING: No

DISCUSSION: The Court addressed the issue by looking for a "special relationship" between the officers at the scene and the victim, Conni Black. The Court of Appeals had concluded that Black was in the custody of the officers and thus, that they had a duty to protect her from third-party harm. However, the evidence presented gives no indication that was the case, nor did Black

appear so impaired as not to be able to make her own decisions as to whether to go with Kritis. As such, the grant of summary judgment was renewed. The Court stated that officers "are not an insurer of the safety of every member of the public ...."

NOTE: This case relates to Chipman v. City of Florence, 866 F.Supp. 332 (E.D. Ky, 1994) and Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

Comm. v. Mitchell
41 S.W.3d 434 (Ky. 2001)

FACTS: On November 30, 1995, Corey Mitchell, his wife and three children were driving to a friend's house. The oldest of the children was in the front seat, between her parents, unrestrained. Mackenzie and Demi, twins, were in the back seat, in car seats that were not attached to the car seat belts, nor were the children buckled into the seats, as required by Kentucky Law.

Mitchell failed to yield the right of way to an oncoming vehicle. Mitchell and Mackenzie were thrown from the vehicle and Mackenzie was killed.

Mitchell was convicted of reckless homicide, and received a probated sentence. The Court of Appeals reversed, stating that because KRS 189.125, which requires the use of car seats, specifically did not create tort negligence, it could not be used to support a criminal recklessness conviction. The Court found that "the failure to secure Mackenzie to the child restraints could in no way be the immediate or direct cause of her death."

ISSUE: May the failure to properly use child passenger restraints be grounds for reckless homicide?

HOLDING: No

DISCUSSION: The Supreme Court agreed with the lower appellate court that since the legislature chose specifically to state that the failure to use a child passenger restraint is not negligence per se, it was not permitted to use that failure to support a criminal conviction. The decision of the Court of Appeals was affirmed.

Lewis v. Comm.
42 S.W.3d 605 (Ky. 2001)

FACTS: On June 30, 1996, Officer Russell of Lexington Metro Police responded to a 911 call from the Wooden Shoe Farm. Luckacs and Turner informed Russell that Lewis had made threatening calls, and that Lewis' wife had gone to request an EPO. During the discussion, Lewis pulled up. Russell drew his weapon and ordered Lewis to raise his hands. Seeing Lewis appeared unarmed, Russell holstered his weapon, called for backup assistance, and ordered Lewis to place his hands on the truck. Instead, Lewis reached inside, pulled a handgun and ordered Russell to cancel the backup. When Lewis became distracted, Russell attempted to take cover but was shot in the neck. (Russell suffered life-threatening injuries that have had permanent results.)

Lewis attempted to flee, but was captured by backup officers The officers were required to use a baton and pepper spray to subdue Lewis, who fought during the arrest. He was arrested and advised of his Miranda rights. Following this, he was asked by one of the responding officers if he shot Russell, and he admitted that he had done so.

During his trial, Lewis claimed to be suffering from serotonin syndrome, as a result of taking Redux and Paxil for a panic disorder. Lewis made a motion to suppress his confession based upon his intoxication and mental illness, but refused the opportunity to

have an evidentiary hearing on the issue prior to trial. At trial, experts testified that while serotonin syndrome may cause certain symptoms, it would not affect the voluntariness of a confession.

Lewis was convicted of Assault in the First Degree, along with other charges. He appealed on a number of issues.

ISSUE: Does the existence of a mental illness automatically make a confession involuntary?

HOLDING: No

DISCUSSION: The Court discussed the issue of whether Lewis' mental illness, which experts indicated did not affect his ability to distinguish right from wrong, and intoxication served to make his confession to a single question by a police officer served to make the confession inadmissible in court.

While the Court agreed that the burden is on the prosecution to prove that a confession is voluntary, if it is in fact questioned, since Lewis did not present any information as to why the Court should hold his confession to be coerced, an evidentiary hearing was not required. The Court looked to the testimony presented on behalf of Lewis during the trial, and held that "the mere existence of a mental condition, by itself ..., does not make a statement constitutionally involuntary."

Matthews v. Comm.
44 S.W.3d 361 (Ky.,2001)

FACTS: On June 26, 1996, Jimmy Matthews was driving south on northbound I-65, in Louisville, Kentucky. He struck Sharon Glover's pickup. Her vehicle struck Charles Hatchell's vehicle head-on, which then flipped upside down and trapped Glover inside the vehicle. Another vehicle was also struck by debris. Glover and Hatchell were both seriously injured as a result.

Officer Steve Johnson, Louisville Division of Police, noticed the strong smell of an alcoholic beverage on Matthews, while in an ambulance at the scene. The rescuers who had extricated Matthews from his vehicle also noticed signs of intoxication. Officers Johnson and Gilsdorf saw Matthews at the hospital and "noted that he was combative and incoherent" and apparently under the influence of alcohol.

Gilsdorf, a veteran traffic officer, watched a woman he believed to be an registered nurse, follow the procedures to take a blood sample. The test indicated a blood alcohol content of .25, well over the legal limit. Matthews license was suspended at the time of the collision.

Gilsdorf testified that he was familiar with the procedures for "drawing blood for alcohol analysis." He watched the nurse draw the blood, packaged the blood in the kit, and noted the information, including the nurse's name, on the box. At the time of trial, the prosecution was unable to locate the nurse, known only as Susan in the opinion. However, Terry Comstock, a state police chemist, testified to the blood test results. Matthews claimed that the prosecution failed to lay a foundation for the blood test, because they could not prove that the nurse was authorized to draw blood under KRS 189A.103(6). The Court overruled the objection, finding that the blood was properly drawn.

Matthews was charged with DUI and Wanton Endangerment (and other lesser offenses, was convicted, and appealed.

ISSUES: 1) May parties other than those listed in the statute draw blood for DUI testing?

2) Must a victim be identified in order to press a Wanton Endangerment charge?

HOLDINGS: 1) Possibly
2) Yes

DISCUSSION: The Court stated that while it "is presumed that those individuals mentioned in the statute and regulations will perform the procedures properly; however, they are not the only persons in the world who can draw blood accurately." The Court found that even if the admission was erroneous, it was harmless error, since there was sufficient other evidence to provide Matthews' condition. The DUI conviction was upheld.

However, with regards to the Wanton Endangerment charge, with the victim being Lucinda Riden, the driver of the vehicle struck by the debris of Glover's car, the Court found that the prosecution did not appropriately link Riden to the Mustang that was damaged – which was never mentioned by the officers nor connected to the damaged vehicle. The testimony never made it clear that "the Mustang was even occupied at the time it was hit by debris." That conviction was overturned.

NOTE: While the Court agreed that individuals other than those listed in the statute might be able to draw blood accurately, it is still important that the individual who drew the blood be properly identified, so that they may be summoned as a witness if necessary. In addition, officers should take note that in order to press a Wanton Endangerment charge, a victim must be identified.

Colbert v. Comm.
43 S.W.3d 777 (Ky., 2001)

FACTS: On December 26, 1995, Louisville police were called to Delores Colbert's home, in regards to a domestic dispute between Colbert and her 19-year-old son, Rontez. When they arrived, Rontez Colbert was donning a bulletproof vest and trying to barricade himself inside the house. The officers chased and eventually captured Rontez, and took him outside. He asked that they get him a particular pair of shoes and a jacket from his basement bedroom.

An officer approached Delores Colbert and explained that her son was known to be violent and was a suspect in a shooting some time before. He asked her for permission to search his room for weapons, and she agreed.[1]

When they entered the bedrooms, the officers saw "gang graffitti," and several handgun boxes. They also located a small safe. The record does not indicate whether the safe was locked or unlocked at the time, but the officers did open the safe. Inside the safe, they found marijuana, a large quantity of crack cocaine, cash, a gun clip and photographs of Rontez and others, with weapons. Appropriate charges were placed against Rontez Colbert.

Rontez Colbert moved to suppress, and the trial court denied the motion. He appealed.

ISSUE: May a parent give permission to search a child's room, when the possession of the room is not exclusive to the child?

HOLDING: Yes

DISCUSSION: The Court recognized this as a case of first impression for the Circuit, discussing the rights of a parent over their home. The Courts have recognized the rights of a individuals to consent to a search

[1] Delores Colbert was expected to be a defense witness, but did not testify. Apparently, she was not called.

of the common areas of a shared home. There was no indication that Colbert paid rent to his mother, not any indication that he and his mother had agreed to his exclusive control of the room. "In the absence of an understanding to the contrary," his mother "retained the right of entry to all areas of her house including the room [her son] occupied. The Court pointed out that the rights of a child is "subservient to that of his parents and he may be excluded at any time." The Court held that Delores Colbert could validly consent to the search.

Moving to the search of the safe, the Court stated that that an officer who has received consent to search a room has the right to search any area that may contain the object being searched for at the time. The Court found any expectation of privacy in the closed space was not reasonable under the circumstances.

Finally, Colbert said that since he was present, the officers should have sought his consent. However, the Court concluded that since his mother had a superior right to the home, it was unnecessary to ask his consent. The Court upheld the denial of the suppression motions.

Stewart v. Comm.
44 S.W.3d 376 (Ky., 2001)

FACTS: On November 28, 1997, the Cadiz (Ky.) P.D. received an anonymous tip that Charles Stewart and a female, Barbara Grubbs, had just bought crack cocaine and were heading to Cadiz, to arrive about 10 p.m. The caller reported that they were in Grubbs' car, traveling from Hopkinsville, and that Stewart would have the cocaine hidden in his mouth. At 10:45 p.m., Officers Moore and Knight saw the vehicle coming into Cadiz from the direction identified. The followed the vehicle as it pulled into a convenience store. Stewart got out and walked toward a nearby motel. The officers motioned Stewart to come to them, and he did so, asking what was the matter.

Moore explained the telephone call they had received, and asked permission to search. Stewart refused. Knight asked Stewart what he had in his waistband. Stewart removed the item and handed it to Knight; it was a pill bottle. Moore asked Stewart to open his mouth, and he did so. Moore could not see inside, and he asked Stewart to open his mouth a second time. Moore thought he saw crack cocaine sticking to the roof of his mouth, but before he could get it, Stewart swallowed it. (Stewart later admitted it was cocaine.) The bottle was later found to contain small amounts of cocaine and marijuana.

He was indicted and made a motion to suppress, which was denied. He pled guilty, reserving a right to appeal the stop and the search, which he subsequently did.

ISSUE: Is an anonymous tip, corroborated, sufficient for a Terry stop?

HOLDING: Yes

DISCUSSION: Stewart claimed that the officers did not have a "reasonable articulable suspicion to conduct an investigatory stop," because the tip "was so lacking in specific detail that it failed to rise to the level of reasonable suspicion."

In this case, however, the Court found that "a substantial portion of the information supplied by the anonymous telephone caller was verified by the personal observations of the police." The tip "included futuristic or predictive information" which gave it more credibility, and "exhibited sufficient indicia of reliability" to "justify an investigatory stop." Finally, the Court found that Stewart handed over the bottle voluntarily, making it a valid

consent. Because the officers had possession of the bottle before asking him to open his mouth, that conduct was, if anything, harmless error, since Stewart was not charged with anything found in his mouth.

Stewart's conviction was affirmed.

Evans v. Comm.
45 S.W.2d 445 (Ky., 2001)

FACTS: On May 3, 1997, Chief Paul Floyd, Elkhorn P.D., saw Troy Evans driving a pickup truck. The vehicle was owned by Larry Hawkins, who was under court order not to be in the front seat of any vehicle, but who was in the passenger seat.

Chief Floyd followed the truck for a short distance and initiated a stop by activating his lights and siren. Evans continued driving for some minutes, until Floyd moved his car in front of the truck. Even then, Evans tried to back up, but the engine stalled. Evans climbed over Hawkins and got out of the truck through the passenger door.

Evans explained that another man had been driving, but he had gotten out of the truck before Floyd saw the truck. Chief Floyd saw that Evans was disoriented, his speech slurred and his breath smelled of an alcoholic beverage. Officer May arrived and took charge of Evans, who refused to take any field sobriety tests, so May took him to jail. Kentucky State Police Trooper Kevin Newsome gave Evans an breath test, and the test indicated a blood alcohol of .144. At that time, the legal limit was .10. He was charged with DUI under KRS 189A.010.

Evans was convicted, and he stipulated that he was a fourth-time offender. He appealed, however, stating that since the charge of 189A.010 included two separate subsections, with (1)(a) being the per se section and (1)(b) being the section based upon driving under the influence of intoxicants. He claimed that the prosecution was obliged to seek conviction based either on his per se illegal alcohol level or based upon his behavior, but not both.

The Court of Appeals disagreed and affirmed his conviction, and Evans appealed.

ISSUE: Must an officer select a subsection when charging under KRS 189A.010?

HOLDING: No

DISCUSSION: Relying upon Comm. v. Wirth,[2] which stated that the prosecution is "not required to elect to prosecute under a defendant under a single subsection of KRS 189A.010 but may proceed under more than one theory...," the Court upheld the conviction. The Court stated that the DUI statute subsections simply "provide different means of committing the same violation."

Collins v. Hudson
48 S.W.3d 1 (Ky. 2001)

FACTS: In September, 1992, Frankfort P.D. Officer Dale Roberts and Franklin County Deputy Sheriff Joe Thornsberry were involved in investigating a series of thefts. They received information that led them to Christopher Pettit, 17. He provided incriminating evidence concerning Paul and Trina Reed, a married couple. In exchange for his testimony, the officers promised that Pettit would not be charged. Pettit stated that he was afraid of Paul Reed, who had previously shot at him.

Later that year, the Reeds and Donald Bryant were indicted for theft. In February, the attorney representing the three requested

[2] 936 S.W.2d 78 (Ky. 1996).

and received the names of the informants and details of the agreements made. The prosecutor was ordered to release that information. The prosecutor discussed the issue with the officers, who were concerned about Pettit's safety if his identity was disclosed. Burton ordered the officers to find Pettit and bring him in to talk to the prosecutor. The prosecutor also delivered a copy of the requested documents to the defense attorney, who turned the file over to his clients.

On June 8, 1993, according to testimony, Paul and Trina Reed conspired to murder Pettit. That next day, a relative of theirs called Frankfort P.D. to tell them that the Reeds planned to hurt Pettit. No one from the P.D. notified Pettit that his identity had been compromised.

The record indicates that some time earlier, Pettit had left Kentucky to stay with relatives in Ohio. He returned to Frankfort at approximately the time the file was turned over to the Reeds. On June 10, Paul Reed and another individual, Cox, picked up Pettit under a pretext and drove him to Ohio, where he was brutally murdered.

Paul Reed was convicted of the murder.

Josephine Hudson, the Administratrix of Pettit's estate, filed a lawsuit against the officers, the City of Frankfort and its police department, Franklin County Sheriff Ted Collins, and others, for negligence and outrageous conduct.

The defendants asked for summary judgment, which the trial court granted, "holding that the defendants owed no common law duty to Pettit under the 'special relationship' test ...."

ISSUE: Do officers owe a special duty to witnesses?

HOLDING: Yes

DISCUSSION: The appellate court upheld the dismissal of the common law negligence action, but held that the officers did owe Pettit a duty under KRS 421.500(4).[3]

The Court also found Franklin County to be not liable because of sovereign immunity. However, the Court of Appeals did not award immunity to Sheriff Collins and his office, stating that KRS 40.040 was a "legislative waiver of immunity."

Comm. v. Fox
48 S.W.3d 24 (Ky., 2001)

FACTS: On the day in question, three officers, a Kentucky State Police trooper, a Beattyville officer and a Lee County deputy sheriff were parked at a Shell convenience store.

Fox parked at the gas pumps, got out, saw the officers and immediately got back into his truck and drove away. The trooper noticed a small child standing between the driver and the passenger, an apparent violation of state law regarding child passenger restraints. The trooper decided the stop the truck. (He was also familiar with Fox's prior drug charges.)

When the vehicle stopped, the police officer asked Fox about the contents of some bags in the bed of the truck. The officers say Fox gave consent to search, but Fox stated he revoked that consent. The officers found prescription drug bottles, syringes and stolen items in the bag, and both Fox and the

[3] The statute holds that, "4) Law enforcement officers and attorneys for the Commonwealth shall provide information to victims and witnesses on how they may be protected from intimidation, harassment, and retaliation as defined in KRS 524.040, 524.045, or 524.055."

passenger, Peters, were arrested. They did not issue a child passenger safety violation. Both were indicted on a variety of charges.

Both asked for suppression, and the lower court agreed to suppress, stating that Kentucky law does not permit a stop based solely on the failure to use child passenger safety restraints.

ISSUE: Is the failure to use child passenger restraints a primary reason for a traffic stop?

HOLDING: Yes

DISCUSSION: The Court closely examined the statute in question, KRS 189.125. The Court determined that while the failure to wear an adult seat belt is not a primary stop, nothing in the statute indicated that same prohibition for a child passenger safety violation, thereby allowing officers to use that violation as a reason to stop a vehicle.

With regards to the search of the bag, the court found that Fox did effectively withdraw his consent before the arrest was made, and that a search warrant was necessary to have further searched that bag. The court noted the pill bottles are not inherently contraband items.

On a side note, the court found that Peters did not have standing to object to the search of the truck, as she was simply a passenger with no ownership interest claimed in the items searched.

Comm. v. Sharpe
58 S.W. 3d 492 (Ky.App., 2001)

FACTS: On June 12, 1998, Trooper Burnett (KSP) and a recruit officer established a traffic roadblock on U.S. 25E, in Bell County, at the Kentucky end of the Cumberland Gap Tunnel.[4] During this roadblock, Sharpe was arrested for driving under the influence. He appealed, based on his contention that the roadblock was defective as it was not established pursuant to KSP policy.[5] He alleged that the location for the stop was unsafe, and produced evidence to that effect.

ISSUE: May a defective roadblock still be considered constitutional?

HOLDING: Yes

DISCUSSION: The Court found that while there may have been technical violations in the establishment of the roadblock, in that the location was not sufficiently described in the records and the name of the approving supervisor was not noted (although his badge number was) as required by KSP policy, that the roadblock did pass constitutional muster.

Yanero v. Davis
65 S.W.3d 510 (Ky.,2001)

FACTS: On April 17, 1997, Ryan Yanero, a member of the Waggener High School (Jefferson County) junior varsity baseball team, was seriously injured during batting practice, by a baseball that struck him in the head. The ball was thrown by a teammate. Yanero was not wearing a batting helmet.

Ryan's parents brought suit against the Jefferson County Board of Education, the teammate, several of the coaches (including Allen Davis, the named defendant) and other school personnel. The parents alleged that

[4]The southern end of this tunnel is in Tennessee, in a wet county, while the northern end is in Bell County, which is dry.

[5] The alleged defects were judged "technical" by the court, as the troopers did seek and receive approval to establish the roadblock.

the defendants were negligent in various ways, particularly in hiring and training personnel and failing to enforce rules.

As employees of the school board, an agency created by the state to carry out of governmental function, many of the defendants raised "governmental or sovereign immunity."[6] The lower courts both awarded immunity to the defendants.

ISSUE: Is a school board and school officials entitled to immunity for discretionary functions?

HOLDING: Yes

DISCUSSION: The Court examined the history of governmental immunity in Kentucky. The Court found that despite a contrary holding in one case[7], the courts have continued to maintain the distinction between discretionary duties, for which immunity is usually accorded, and ministerial duties, for which immunity is not generally given.

The Court also addressed the issue of the Board of Claims Act, and stated that this act was not a creation of immunity, but "rather a limited waiver of immunity to the extent that immunity exists." The Court found that the statute is null with regards to public employees, as they are not actually "vested with immunity for the negligent performance of their ministerial functions." Finally, the court determined that the determination of whether a local board of education (mandated by the state) is accorded some level of immunity depends upon the nature of the activities, and it concluded that conducting athletic activities is a governmental function for which such immunity is accorded.

Against the coaches, the court agreed that the cause of action was essentially one of negligent supervision, for failing to enforce a known rule to wear batting helmets. The court stated that "[t]he promulgation of such a rule is a discretionary function; the enforcement of it is a ministerial function." The decision of the possible negligence of the coaches and the teammate was left to a further jury determination.

Comm. v. Banks
68 S.W.3d 347 (Ky. 2001)

FACTS: On September 19, 1996, Lexington-Fayette Urban County police officers, Bloomfield and Sedlaczek, were patrolling a high crime area of the community on foot. They spotted Banks walking in their direction through the front yard of an apartment building that was posted "No Trespassing." The officers were familiar with the residents of the complex and did not recognize Banks.

When Banks saw the officers, he stopped, put his hands in his pockets and walked away in another direction. He seemed surprised to see the officers.

Officer Bloomfield spotted a bulge in Banks' pocket, so he asked him to remove his hands. Banks did so, but the bulge was still there. Thinking it may be a weapon, Bloomfield frisked Banks and decided it was instead, some type of drug paraphernalia. He asked Banks if the object was a crack pipe, but Banks said he didn't know. Bloomfield asked if he could remove the item, and Banks agreed. When he removed the item, which was a crack pipe, Bloomfield arrested Banks. During the search incident

[6] These terms have been used interchangeably, although usually government immunity is applied to municipalities/cities and sovereign immunity is applied to counties and the Commonwealth.

[7] Franklin County v. Malone, 957 S.W.2d 195 (1997)

to arrest, the officer also found rolling papers, another pipe and two rocks of crack cocaine.

Banks took a conditional plea of guilty, appealed and won a rehearing. He again took a conditional guilty plea and again appealed. At that time, the Kentucky Court of Appeals found that the officers did not have sufficient reasonable suspicion for a Terry stop and frisk.

ISSUES: 1) Were the actions of the suspect sufficient for reasonable suspicion?

2) Is the recognition that an idem in contraband, strictly by touch, sufficient for "plain feel?"

HOLDING: 1) Yes
2) Yes

DISCUSSION: The Court found that Banks was not seized when the officers approached, as they are free to approach and speak to anyone. They did not seize Banks when they asked him to remove his hands, as that was simply a safety precaution.[8] Banks was not seized until he was frisked.

At the time he was frisked, Bloomfield had reasonable suspicion. Banks was in a high crime area, on property where he did not apparently belong, and he took what appeared to be evasive action when he saw the officers. Even though the Court realized that they did not know for sure that he was trespassing, there were enough indicia to meet the Terry standard.

As for the removal of the crack pipe, the court looked to the "plain feel" doctrine to allow for the "discovery of non-threatening contraband" if it "is immediately apparent from the sense of touch while the suspect is lawfully frisked.

The conviction was upheld.

Comm. v. Gaitherwright
70 S.W.3d 411 (Ky., 2002)

FACTS: In October, 2000, Joseph Gaitherwright was charged with a first-time DUI. He refused to submit to any substance testing. The statute says refusal is an aggravating circumstance that can subject a party to an enhanced penalty. The trial court ruled, based upon the literal language of the statute, that first-time DUI offenders are not subject to such enhancement of penalties for refusal. He was found guilty of DUI. The Kenton County court found that because of the precise language in the statute, which stated that the aggravating offense must happen at the same time as the DUI, that refusal could not be an aggravating circumstance because it could not occur at the same time the individual was driving.

ISSUE: May a first time DUI offender be subjected to enhanced penalties for refusal of a breath or other required test?

HOLDING: No

DISCUSSION: The Court stated that the statute indicated that the legislature did not intend to put the additional penalty of automatic jail time on the first-time offender, as it clearly did for further offenders. It showed that there are additional penalties even for a first-time offender who refuses, such as suspension of the operator's license, duty of the prosecutor to oppose amending the DUI charge to a lesser offense, and denial of hardship license privileges.

The conviction was upheld, but the penalty could not be enhanced to jail time because of the refusal.

[8] Baker v. Comm. 5 S.W.3d 142 (Ky., 1999).

U.S. District Court, Eastern/Western Districts of Kentucky

Fultz v. Whittaker
187 F.Supp.2d 695
(W.D. Ky. 2001)

FACTS: On the day in question, Officers Nuss and Whittaker (Oldham County P. D.) were called to a domestic disturbance. When they arrived, Whittaker began to question Woodford and Granville Fultz (Plaintiff William Fultz' uncle and father). Plaintiff Fultz approached, "intoxicated and agitated," and came very close to Nuss, who instructed him to back up and show his hands, which were in his pockets. When he removed his hands, his actions appeared threatening to Whittaker, who grabbed his arm, told him he was under arrest and with Nuss, tried to handcuff Fultz. Fultz resisted by locking his hands in front of his body. Whittaker sprayed him with O.C. to little effect. After struggling for several minutes, the officers were finally able to handcuff Fultz.

As they walked him to the police car, Fultz suddenly kicked Nuss near the groin. Whittaker, who was behind Fultz, grabbed him in a "bear hug" and eventually they both fell to the ground. At some point, Fultz suffered a fracture to neck vertebrae, resulting in paralysis from that point down.

The versions reported by the various witnesses differed on two major points: whether Whittaker used some sort of a neck hold on Fultz and whether Whittaker acted deliberately to break Fultz's neck. Whittaker denied both, and Nuss was not in a position to see the fall, as he was doubled over from the kick.

Nuss and Whittaker asked for qualified immunity from suit.

ISSUE: May qualified immunity be granted when there are material contested facts?

HOLDING: No

DISCUSSION: The Sixth Circuit has a three-part test to determine if qualified immunity is appropriate. First, has there been a constitutional violation? Second, is the right clearly established at the time? And, third, did the plaintiff present sufficient facts, supported by evidence, that "what the official did was objectively unreasonable in light of the clearly established constitutional rights?"

While the Court determined that several of the issues alleged could be dismissed under qualified immunity, the court declined at this time to dismiss the entire lawsuit. It left open the door, however, that following further discovery on the contested facts, it may reconsider the request for summary judgment.

NOTE: This case also considered claims made against Oldham County Fiscal Court members and other county officials for deficient training and related issues. Most of those claims were dismissed.

U.S. v. Ware
154 F.Supp.2d 1016
(W.D.Ky, 2001)

FACTS: On February 8, 2000, Det. Dotson of the Louisville/Jefferson County Metro Narcotics Unit, working at the Louisville International Airport, noticed a suspicious Federal Express package. It had been shipped overnight from Daytona to David Jones, in Louisville. Dotson placed the package among others, and allowed his drug dog to sniff. The dog alerted on the package.

Dotson paged Det. Nunn, and took the package to the airport office. Det. Nunn submitted two warrants, one to open the package and one to install a tracking device in the package. Both were granted. The order allowed the officers to move in as soon as the tracking device indicated the package had been opened.

The detectives opened the package and found a pair of basketball shoes. Inside each was found a quarter-kilo of cocaine. They removed all but a small amount of the cocaine and installed the device, then resealed the package.

At the same time, Det. Napier wrote a warrant for the address on the package. Det. Dotson attempted a controlled delivery, posing as the FedEx delivery person. Another resident told him that "Ricco" was in school and would be back later. When Dotson returned that afternoon, Ware answered the door and signed "David Jones" to the receipt.

A few minutes later, Ware left in his car, but returned quickly. He repeated this behavior again. The officers believed he was surveilling the neighborhood. He then left again, carrying a department store bag. At this time, the transmitter indicated the package was moving, so Det. Nunn and Napier followed Ware.

Suddenly, Ware stopped the car and watched those that drove past. Nunn and Napier were among those that drove past him. Ware then continued on to the University of Louisville campus, a few blocks away, and pulled into a driveway. Officers in unmarked cars blocked him, and them removed him from the car and forced him to lie on the ground. He was frisked and handcuffed, and informed of his Miranda rights. They found the unopened package in the vehicle, inside the bag.

Relying on the Napier warrant, the officers returned Ware to his apartment and searched it. They found scales, baggies, weapons and personal papers. Nunn and Napier took the items to be booked, while Det. Pitcock took Ware for booking. Pitcock radioed Nunn and Napier to tell them that Ware wished to talk to them.

Ware was taken to an interrogation room. While being both video and audiotaped, Nunn read him his rights. Ware stated he was a little "hazy" on what they meant, and Nunn repeated them.

The Court recited from the discussion about the rights, the issue in this case. Nunn discussed Ware's getting an attorney, possibly a public defender. Pitcock explained that it was Ware's responsibility to find one, or ask for a public defender. They assisted him by providing a telephone book, and helping him locate a particular attorney that he had heard of in the past. The officers found the telephone number and Nunn left to try to reach the attorney's office. He was unable to do so, leaving a message and giving the attorney the detective's pager number.

Ware then decided to talk to the detectives, and Nunn cautioned him. Ware eventually challenged the admission of all of the evidence, including the statement. The magistrate recommended the entire statement be suppressed, but not the rest of the evidence.

ISSUE: 1) May a suspect be handcuffed during a Terry stop?

2) May officers depend upon a defective warrant that is objectively unreasonable?

3) May an interrogation continue after a suspect has requested counsel?

HOLDING: 1) Yes
2) No
3) No

DISCUSSION: The Court addressed each issue in turn. The found the brief seizure of the package to be totally permissible, as well as the dog sniff. That information was sufficient for the warrants. However, since the triggering event, the opening of the package, never occurred, no warrant existed to authorize Ware's stop.

But, the police had other authorization to stop the car. First, they had reasonable suspicion under Terry. Even the handcuffing and restraining was permitted, under Houston v. Clark County Sheriff Deputy John Does 1-5,[9] when the officers found it reasonably necessary for their safety. When they stopped the vehicle, they saw the suspect package in plain view, and that led to a proper vehicle exception search.

With regards to the apartment search, the Court stated that the lower courts had classified the Napier warrant an "anticipatory warrant," used to "obtain advance approval to search upon the anticipated occurrence of specific events." Such warrants must give a "triggering event," and without that event, the warrant is void. The Court found, however, that the language of that warrant did not make it anticipatory, although only a few words would have served to make it so. Comparing the Napier warrant to other similar cases, the Court found that the Napier warrant contained insufficient information to meet the probable course requirement, although the Court now knows that they did, in fact, have more information, and that information would have proved sufficient, had it been listed on the warrant.

However, the analysis does not stop there, as officers are entitled to rely upon a magistrate's determination, if that reliance is "objectively reasonable and in good faith." In this case, the Court found that the "sheer absence of corroborating information in the affidavit" made their reliance on the warrant objectively unreasonable, and they found that suppression was appropriate.

With respect to the interrogation, the Court found that despite "Det. Nunn's care," that the police did in fact initiate discussion with Ware after he specifically requested an attorney. In this case, "Ware answered a question posted by a detective in the same custodial interrogation after he had requested an attorney." Because there had been no real break in the discussion, the court found that Ware's "incriminating statements occurred in the same custodial interrogation as his initial request for counsel," and that was impermissible.

The Court suppressed his statements as well.

[9] 174 F.3d 809 (6th Cir, 1999.)

United States Court of Appeals, Sixth Circuit

U.S. v. Haddix
239 F.2d 766 (6th Cir. 2001)

On September 17, 1998, the U.S. Forest Service and the Kentucky State Police were searching for marijuana growers. From a helicopter, officers spotted a patch of marijuana behind Haddix's residence. Approaching on the ground, officers heard electric motor sounds, and saw electric lines leading to other buildings on the property. They also saw 67 marijuana plants. Officers knocked on the back porch screen door. Through the door, they saw a semi-automatic assault rifle; they entered and seized the weapon. The continued into the house, and found Haddix asleep "atop two more guns and more marijuana." He was arrested.

The police sought a search warrant and, upon searching, found more drugs, growing and processing equipment, security equipment and additional weapons. Eventually, Haddix was found guilty of a variety of charges, and appealed.

ISSUE: May officers create a situation to justify an exigent circumstances entry?

HOLDING: No

DISCUSSION: The police argued that they had exigent circumstances in their entry of the home, and in the alternative, that they would have "inevitably discovered" the challenged evidence. The Court looked to U.S. v. Morgan,[10] which listed three exigent circumstances that justify a failure to obtain a warrant: 1) hot pursuit, 2) when a suspect presents an immediate danger and 3) when immediate action is needed to prevent the destruction of evidence or to thwart the escape of known criminals. The Court strongly stated that the police are not "free to create exigent circumstances" to justify entry. There was no indication of immediate harm to the officers or others, nor any evidence that the evidence was being destroyed.

While the Court did not disagree that the officers had probable cause sufficient to obtain a warrant, just from their observations outside the house, that did not relieve them from the responsibility of getting a warrant. The Court held that "the warrant requirement is at the very heart of the Fourth Amendment, and that judicial exceptions to it are only exceptions."

Turning to the inevitable discovery argument, the Court found no indication that the police were involved in any other separate investigation other than the chance fly-over, and stated that a successful inevitable discovery argument required "evidence of an 'independent, untainted investigation that inevitably would have uncovered the same evidence' as that discovered through the illegal search."[11]

The Court suppressed all evidence.

U.S. v. Kimes
246 F.2d 800 (6th Cir. 2001)

FACTS: Kimes is a Vietnam veteran. He sought treatment and was diagnosed with depression and post-traumatic stress disorder, at the V.A. Medical Center at Mountain Home, Tennessee. Although he was entertaining suicidal thoughts, his counselor determined that he was not an immediate danger, and entered into an agreement (a "verbal safety contract") with him that if he was about to hurt himself or

[10] 743 F.2d 1158 (6th Cir., 1984)

[11] Quoting U.S. v. Leake, 65 F.3d 409 (1996).

others, he would call or come to the V.A. emergency room.

Several days after this session, two V.A. officers, Dougherty and Ensor, saw Kimes' truck, with a blanket over the windshield, parked in the back corner of the V.A. parking lot. They knocked on the window and asked if he needed assistance.

Kimes got out of the truck and slammed the door, stating that he had done nothing wrong and wanted to go to the E.R. Dougherty attempted to calm him, and laid his hand on his shoulder. A struggle began, and Kimes and the two officers fell to the ground. Kimes attempted to take Dougherty's gun from its holster.

Following his arrest, Doughterty was taken to the station and questioned by Officer Warren. Kimes stated he had some tools in his truck and wanted it to be secured, and offered the keys to do so. Warren gave the keys to Ensor and told her to search the truck. During the search, she found a bayonet and a filet knife. She removed the knives and had the vehicle impounded and towed. He was charged and convicted of the assault on a federal officer and the possession of illegal weapons on federal property.[12] Kimes appealed.

ISSUE: May evidence found in an illegal search be admitted under the inevitable discovery exception?

HOLDING: Yes

DISCUSSION: Kimes asked for suppression of the knives, stating that they had been seized during an impermissible warrantless search. The Court agreed, however, with the government which also claimed that the knives were admissible under the inevitable discovery doctrine.[13] The policy of the V.A. was to inventory and tow vehicles that did not belong in the parking lot. As Kimes was a prisoner, not a patient, the vehicle would have eventually been removed, triggering an inventory search. Kimes argued that they should have allowed a family member (in this case, his wife) to come to get the truck, as they had done in other cases, but the government showed that while that did happen on occasion, they were not compelled to do so. The Court agreed. Kimes also argued that the policy, which does not require an exhaustive listing of everything in the truck, only items the officer considers valuable, allowed too much discretion, but the Court disagreed, allowing the police some flexibility in that matter.

The Court upheld the search and conviction.[14]

Kostrzewa v. City of Troy
247 F.3d 633 (6th Cir. 2001)

FACTS: On November 18, 1998 Officer Sewell (Troy P.D.) stopped Kostrzewa for making an illegal left-hand turn. Sewell discovered that Kostrzewa's license was suspended for failure to pay a previous ticket, and that there was an outstanding civil warrant for failure to pay child support. Officer Sewell arrested Kostrzewa and summoned other officers, Kocenda and Jenkins, to transport him.

Kostrzewa claimed that Kocenda and Jenkins handcuffed him too tightly, and

[12] Federal law prohibits the possession of a knife with a blade length longer than three inches on V.A. property. 38 U.S.C. §901(c) / 38 C.F.R. §1.218(b)(39).

[13] Neither side apparently raised the issue of consent, so the Court did not consider it.

[14] The Court also upheld the assault conviction, based upon grounds specific to the federal law on the matter.

Kocenda's report indicates that because Kostrzewa had large wrists, the cuffs could only be "latched to the first tooth." (The officers also stated that they were required by policy to handcuff all detainees.) Kostrzewa also claims that his wrists were further injured because the officers "amused themselves with unnecessary speeding, tailgating, abrupt braking, and general reckless driving along a winding road," and that as a result, he was thrown around inside the car.

When they arrived at the police department, he requested medical care, but was informed that he had to be booked first. Sergeant McWilliams was informed that Kostrzewa was asking for medical care, and Kostrzewa alleges, he was informed that further demands for medical treatment might result in a charge for "hindering and obstructing." However, he continued to request treatment. Finally, Officers Kocenda and Jenkins were assigned to take him to the hospital. A larger set of cuffs was used on the hospital trip. The doctor prescribed ice and ibuprofen. Kostrzewa claimed that the trip back to the station was reckless as well.

The district court granted a motion to dismiss all claims except that against McWilliams, and eventually, that too was dismissed. Kostrzewa appealed.

ISSUE: 1) May officers' alleged actions during transport be a cause of action under 42 U.S.C. §1983?

2) May an agency's policy on mandatory handcuffing during transport be questioned?

HOLDING: 1) Yes
2) Yes

DISCUSSION: The Court overturned the summary judgment in favor of the defendant officers, stating there was a genuine issue of fact as to the propriety of the officers' actions. The Court also reinstituted the gross negligence claim made under Michigan law. Finally, the court reversed the decision of the lower court to dismiss the 42 U.S.C. § 1983 claim against the City of Troy, allowing the plaintiff to go forward in an attempt to prove the city's handcuff policy unreasonable.

U.S. v. Taylor
248 F.2d 506 (6th Cir. 2001)

FACTS: Officers Bagley, Rought and Sandlin, Kalamazoo Valley Enforcement Team (KVET) were investigating a report that Taylor was involved in dealing in drugs and weapons, and being a member of the Michigan militia, as well as being a murder suspect. Although they did not have a warrant, the decided to go to Taylor's home to talk to him.

The apartment building had a security system, which required visitors to be buzzed in. Not wishing to alert Taylor, they rang other apartments until a resident agreed to let them in, provided her identity not be revealed. Once inside, they knocked on Taylor's apartment.

A voice called out, asking who was at the door. They identified themselves as police and asked the person to come to the door. They heard some noise from inside, and then "the embodiment of the voice came to the door." One officer displayed his badge and ID to the peephole, and the voice asked the officers to wait until he could call his grandmother. Finally, a man fitting Taylor's description answered the door and allowed the officers to enter.

Crowded into the narrow entryway, the officers asked if they could move into the living room. The man, who identified himself

as Renaldo, agreed.[15] He also agreed that Taylor lived there, but said that he was at the gym.

In the living room, Officer Bagley spotted a marijuana stem, lying on the table. He drew Rought's attention to it by shining his flashlight upon it, who examined it and agreed it was marijuana.

At that point, the officers told Hill that they would be obtaining a warrant, and would secure the premises until that time. Hill denied that there were drugs or other people in the apartment, but the officer explained they would be doing a protective sweep. During the sweep, Officer Bagley found Taylor, hiding in the bathtub behind a shower curtain. He also found an open duffle, reeking of marijuana, that held baggies of marijuana. He did not immediately seize the marijuana, but left to obtain the warrant. Rought and Sandlin stayed at the apartment with Hill and Taylor, who sat on the couch, handcuffed.

When Bagley returned with the warrant, the officers searched and found 20 to 30 pounds of marijuana in the duffle, a large quantity of powder cocaine, cash, drug paraphernalia and a handgun. Significantly, the gun, with a laser scope, was strapped below an ironing board aimed at the front door.

Taylor was arrested. He moved to suppression the evidence based upon a claim of an illegal search. The motion was denied and he was convicted. He appealed.

I**SSUE:** 1) May an officer gain entry into a locked foyer by seeking admission from someone other than the resident they are seeking?

2) May a minute amount of drug evidence justify a warrant request and sweep search?

3) Is a protective sweep of a location allowed when officers are waiting for a warrant to be issued?

HOLDING: 1) Yes
2) Yes
3) Yes

DISCUSSION: First, the Court addressed the issue of the officers' entry into the building. In U.S. v. Carriger,[16] the court had held that a "tenant had a reasonable expectation of privacy in the locked common areas of an apartment complex." In that case, the officers had entered by slipping in behind some individuals who were leaving, they were not actually admitted by anyone. Here, however, a resident admitted the officers, and the Court found that to be proper.

Next, Taylor claimed the marijuana stem was not sufficient evidence to permit a sweep of the apartment or to authorize a warrant. The Court noted that the stem was in plain view. Taylor claimed that possession of "mature stalks" of marijuana was not illegal and as such, it was not incriminating. However, the Court found that since the officers recognized that it was marijuana, it was not impermissible for them to act based upon what they saw.

Finally, the Court looked at whether the sweep was proper. The Court agreed that given what they had heard prior to Hill's opening the door, it was not unreasonable for them to do a protective sweep. Taylor attempted to claim that a sweep was only appropriate when connected to an arrest, but the Court stated that the primary case,

[15] Renaldo turned out to be Clem Renaldo Hill, Taylor's brother.

[16] 541 F.2d 545 (6th Cir. 1976).

Maryland v. Buie,[17] was actually based upon Terry v. Ohio,[18] the sweep was appropriate.

Finally, the Court noted that since even prior to the protective sweep, the officers had sufficient probable cause to seek a warrant, that the search pursuant to the warrant would have inevitably revealed both Taylor and the drugs – "assuming, of course, that such a course of action had not resulted in an attack on the officers who remained in the apartment and the destruction of the evidence during the wait ...."

McCurdy v. Montgomery County, Ohio
240 F.3d 512 (6th Cir. 2001)

FACTS: On July 6, 1996, McCurdy hosted a party for his nephew, who had just graduated from college. Following the party in the clubhouse, several of the partygoers retired to McCurdy's apartment to play cards. They had been drinking.

About 5 a.m., McCurdy and his son escorted two guests to their cars. The four men stood outside chatting. Officer Cole, on regular patrol, drove by. He then circled back towards them, stopped and gained their attention stating "what's up, gentlemen?

McCurdy replied, but Cole could not hear him and asked him to repeat. McCurdy replied, in a profane manner. Cole got out of his vehicle and approached the group, questioning McCurdy about his language. He said it was his job to check out the situation. Cole asked all of the men for ID, McCurdy said his ID was inside, as this was his home.

Cole asked if McCurdy had been drinking, and he agreed. He ordered him to go back inside because he was intoxicated. Cole refused. Cole told him he would be arrested, and McCurdy asked on what grounds. They repeated the exchange. Finally, Cole arrested him. He was eventually charged with Disorderly Conduct/Public Intoxication and Obstructing Official Business.

McCurdy sued on an invalid arrest.

ISSUE: 1) Must a public intoxication charge be based upon a risk of harm?

2) May an officer retaliate with arrest for profane or abusive language directed at the officer?

HOLDING: 1) Yes
2) No

DISCUSSION: First, McCurdy claimed that Cole did not have probable cause for the arrest. Similar to Kentucky, in Ohio Public Intoxication requires both that the subject be intoxicated and present a risk of harm to themselves, others or property. While there was little doubt that McCurdy was intoxicated, Cole presented no reasonable belief that McCurdy presented any risk to anyone at the time he spotted him. (Officer Cole stated that "one of a million things" could happen if he didn't take him into custody.) The Court agreed that the issue deserved further consideration and remanded it to the lower court.

Next, McCurdy claimed that Cole was retaliating against him (by the arrest) for his speech, and that Cole was not entitled to qualified immunity on that claim. The Court stated that "[t]here can be no doubt that the freedom to express disagreement with state action, without fear of reprisal based on the expression, in unequivocally among the protections provided by the First Amendment." The Court also agreed that a "public official's retaliation against an individual exercising his or her First

[17] 494 U.S. 325 (1990).
[18] 392 U.S. 1 (1968).

Amendment rights is a violation of §1983. Since that the lower court had not explored issue, that issue was also remanded back.

Guest v. Leis
255 F.3d 325 (6th Cir. 2001)

FACTS: In 1995, the Hamilton County Sheriff's Department received a complaint about on-line obscenity, and RECI (Regional Electronic Computer Intelligence Task Force) began an investigation. The looked at several computer "bulletin boards," also known as a BBS, including the CCC BBS. The CCC BBS computer were operated by Robert Emerson in Union Township (Clermont County), Ohio. The system had thousands of subscribers, who shared e-mail and files, including photographs, and read messages from other users.

RECI officers gained access to the adult portion of the site with an alias. They downloaded sample images and showed them to a local judge, who deemed a number of them obscene. With the help of the prosecutor, they prepared a warrant, which was signed by a Clermont judge, who directed it to the police chief of Union Township.

RECI (Hamilton County) officers, along with local officers, executed the warrant in Clermont County. Eventually, being unable to seize just the images, they took the entire computer system, including the file servers. The deputies used a program to search for the obscene files, and once they located them, the testified that they searched no further. While the case was pending, RECI returned the computer equipment to the owner.

The plaintiffs, members of the subscriber service, were granted class-action lawsuit, and claimed that the deputies had in fact read their e-mail and thus violated their privacy.

A similar issue arose which another, much smaller, BBS, called the Spanish Inquisition BBS. This lawsuit was not certified as a class-action.)

In this case, the plaintiffs also claimed that the Hamilton County officers did not have jurisdiction to serve a warrant outside their home county. Although state law does permit this, it also requires that local officers must accompany and remain with the foreign officers during the search. The court held that this was at most a state issue, not a constitutional one, and did not address the issue further.

The district court granted the defendants qualified immunity, and dismissed all claims against them.

ISSUE: Do subscribers to a computer service have a reasonable expectation of privacy in their computer communications?

HOLDING: No

DISCUSSION: The Court stated that the users of a public bulletin board have no expectation of privacy in the information that they post on that system. The court clarified that e-mail, like letter mail, has no expectation of privacy once it reaches its recipient.

The Court also stated that simply stating that the officers *could have*[19] read the plaintiffs' e-mail, that did not indicate that they did, and the officers had a legitimate reason to at least confirm that the files were as the purported to be, e-mail. The subscriber information revealed by the search was not beyond the scope of the search, and that

[19] Emphasis in original.

individuals "lose a reasonable expectation of privacy in their information once they reveal it to third parties."

The Court upheld qualified immunity and awarded summary judgment.

U.S. v. Campbell
261 F.3d 628 (6th Cir 2001)

FACTS: On January 20, 1999, Louisville/Jefferson County Metro Narcotics officers were checking packages at a Federal Express office, when a drug dog detected narcotics in a particular package. As a result, Det. Napier obtained and executed a warrant on the package. Inside was found over 1,000 grams of methamphetamine.

The officers decided to make a "controlled delivery" of the package, removing most of the methamphetamine. It was repacked along with a transmitting device that would trigger when the package was opened. They also obtained an "anticipatory search warrant" for the address on the package. The package was delivered. Eventually, Campbell came to the building and picked up the package, carrying it to another location – later determined to be Campbell's residence.

In a totally unrelated situation, a marked car was near the residence, issuing a traffic ticket. Napier testified that Campbell and another man watched the transaction, and appeared nervous. Eventually, Campbell went into the house and the transmitting device indicated that the package had been opened.

Although the search warrant did not specify the residence, the commanding officer, Sergeant Hatcher, ordered that they enter the premises. They located Campbell in the garage with the package. Napier read Campbell his rights and requested a consent to search, which he received. After a hearing where his suppression motion (on the basis that the entry was not permissible) was denied, Campbell entered a conditional plea of guilty.

ISSUE: Is a controlled delivery of a narcotics package sufficient to make the claim that the government "created" the exigent circumstances under which a search is performed?

HOLDING: No.

DISCUSSION: The Court distinguished this situation from a series of other precedent-setting cases. The Court did not accept Campbell's allegation that the government created the exigency (the evidence would be destroyed) by delivering the package. The Court also agreed that the officers could not have anticipated the unexpected relocation of the package prior to its being opened, and thus could not have gotten a search warrant.

The Court upheld the denial of the suppression motion.

U.S. v. Salgado
250 U.S. 438 (6th Cir. 2001)

NOTE: While the facts of this prosecution are lengthy and convoluted, only those facts connected to the issue will be related.

FACTS: The evidence in this case led Louisville police officers to believe that a silver Mustang belonging to Eduardo Garcia, of Miami, Florida, was being used to transport cocaine to and from Louisville, Kentucky.[20]

[20] One of the dealers involved in this case was Shy Heath, who was arrested by Louisville police just prior to the arrest of the defendants in this case. See his case elsewhere in this update.

On May 1, 1998, Louisville police executed a search warrant on the residence of Francisco Portuondo-Gonzalez, on Patterson Drive. A quantity of cocaine and other items were found. During that search, phone calls from the apartment of Wilfredo Jambu, on Bermuda Lane, rang at Salgado's cell phone.

At some point, Jambu and Portuondo-Gonzalez's wife left the Bermuda Lane apartment and headed in the direction of the Patterson Drive address. On the way, they were stopped and arrested.

Later that day, the police located the silver Mustang, in the parking lot of the Tanglewood Apartments.[21] A drug dog alerted on the vehicle. The officers searched the vehicle and found a door key. Officer Seelye decided to use the key to see if it fit the lock on Jambu's front door, at the complex. Knowing the location of Jambu's apartment, he entered the common corridor through an unlocked door. He fitted the key to the door and determined that it did operate the lock, but he did not open the door.

Jambu claimed this action was an unlawful search.

ISSUE: May an officer test a key simply to determine if it works on a particular lock?

HOLDING: Yes

DISCUSSION: The Court compared this case to that of U.S. v. DeBardeleben,[22] where they decided that simply inserting a key was not a search, since the owner had no expectation of privacy in the public side of the door. In both situations, the officer was lawfully in possession of the key. However, since the DeBardeleben case involved using a vehicle key, not a key to a residence, Jambu claimed that a residence was distinguishable. However, the Court did not agree with Jambu's argument, and denied his request to exclude the evidence that the key fitted the lock.

[21] Bermuda Lane is one of the streets in the Tanglewood Apartments complex.

[22] 740 F2d 440 (6th Cir. 1984) cert. den. 469 U.S. 1028 (1984).

Darrah v. City of Oak Park
255 F.3d 301 (6th Cir. 2001)

FACTS: On October 8, 1995, Darrah arrived at the Detroit Newspaper Agency's (DNA) distribution center, to engage in organized picketing in support of newspaper workers. This was to coincide with the Sunday morning distribution of the newspaper.

Seeing the growing number of picketers, Det. Krizmanich of the Oak Park P.D. called for assistance from other agencies nearby. 37 officers and 13 commanders responded, including the co-defendant, Officer Russell Bragg, of the Troy P.D.

By about 4 a.m., 200 picketers had arrived. After several hours of negotiations intended to convince the picketers to clear the driveway so the trucks could leave, the officers decided to attempt to move the picketers. Using picketers, the police told the crowd that they were in violation of an Oak Park ordinance, and the crowd became even more vocal, chanting at the officers.

Following the warning, the "officers formed into two lines and began to walk toward the middle of the driveway." Their intent was to expand the lines out from the middle of the driveway, effectively pushing the picketers out of the driveway. They had no shields, batons or tear gas. If they met physical resistance, they were to retreat to the staging area and regroup. There were also three "arrest teams," intended to arrest such individuals as necessary. Officer Bragg was a member of one of those teams.

When the police began to open the lines, about half of the protesters moved voluntarily. One group stayed, however, remained in a tight circle. Lt. Cain, the commander, approached the group and instructed them to leave, and Dearmond, one of the group, "looked defiantly" at Cain. Cain instructed the arrest team of Bragg, Petrides and Smith, to arrest Dearmond.

Petrides and Bragg grabbed Dearmond, but another picketer jumped on their backs before they could secure him. Dearmond "backpedaled further into the crowd" and the officers pursued. Darrah (the plaintiff) did not see the original altercation, only Bragg and Petrides chasing down Dearmond. She later stated the officers "ram[med]" Dearmond to the ground and placed him in an arm control hold.

Witnessing this, Darrah grabbed Bragg by the ankle and began tugging, telling him not to hurt Dearmond, as she considered Bragg's actions brutal.[23]

Bragg pulled loose but she grabbed him again. Both parties agree that at this point, Bragg "turned and swung backward," hitting Darrah in the mouth. She fell backwards and struck her head, suffering a split lip that required stitches. Bragg stated he did not get a good look at the person he struck, other than to know she was female. Dearmond again escaped into the crowd. [24]

Afterwards, the officers and Cain spoke to Darrah, but she refused to identify herself. Her personal information was obtained from the ambulance crew that treated her on the scene. More than four months later, an arrest warrant was issued for Darrah, charging her with obstruction. She was acquitted at trial and filed suit. Eventually, all of the claims were dismissed on summary judgment in favor of the defendants, and Darrah appealed.

ISSUE: Is a non-arrest use of force judged under the Fourth or the Fourteenth Amendment standard?

HOLDING: The Fourteenth

DISCUSSION: The Court recalled that not all excessive force claims fall under the Fourth Amendment, although certainly most do. When the use of force constitutes a search and/or seizure, the Fourth Amendment's "objective reasonableness" test will control. When the use of force does not involve a search and/or seizure, the "substantive due process" analysis of the Fourteenth Amendment is more appropriate. To reach this level, the Court stated, the conduct must "shock the conscience,"[25] and be taken with "deliberate indifference" towards the plaintiff's civil rights. Such "reflexive actions" will only satisfy that requirement if done "maliciously and sadistically for the very purpose of causing harm."[26] That determination "depends upon the factual circumstances of the case."

However, the Court found that in the fact pattern given, Bragg's conduct was not impermissible under either test. Even if Darrah believed Bragg's use of force against Dearmond to be excessive, she did not have a right to intervene physically and interfere with the arrest.[27] The Court affirmed the

[23] Bragg stated she was tugging not at his foot, but at his gunbelt, but as this is a summary judgment motion, only facts most favorable to the moving party may be considered.
[24] There is no indication whether Dearmond was ever actually arrested.

[25] From Sacramento v. Lewis, 523 U.S. 833 (1998)
[26] Id.
[27] Third-party interveners do not have a right to use physical force to resist an unlawful arrest, although the arrestees may be allowed to do so.

lower's court's summary judgment decision in favor of the defendants.

U.S. v. Harris
255 U.S. 288 (6th Cir. 2001)

FACTS: In 1998, Det. Hope (Chattanooga P.D.) learned from a CI[28] that "Fat Boy" was selling crack cocaine from a particular residence. At Hope's request, the CI purchased one rock of crack on August 11, 1998. On October 8, the CI purchased another rock.

On October 9, 1998, Hope prepared a search warrant affidavit. At issue in this case is Hope's statement that the informant made "several" buys. While not revealed on the affidavit, Hope advised the court of the identity of the CI and that the CI had, in fact, made two controlled buys. Later that day, the CI returned to the house and tried to make another buy, but was unsuccessful. The officers waited until the next week to execute the warrant, because the CI told Det. Hope that there may not be drugs at the location over the weekend.

On October 13, the warrant was executed. Defendant Aaron Taylor[29] was apprehended fleeing the house. Harris was found in an upstairs bathroom, seated on the toilet, with crack cocaine nearby. The police officer did not knock before entering the bathroom, but had shouted "police, warrant" as he proceeded up the stairs.

Both parties moved to suppress. While the court found the warrant "a little short," it found that it fell within the "good faith" exception. The Court denied Harris' claim of a violation of his expectation of privacy in the bathroom, as he was only a temporary visitor to the house, there for illegal purposes.

ISSUE: Does a casual visitor have a reasonable expectation of privacy in a house?

HOLDING: No

DISCUSSION: Looking back at another decision, which concerned a similar affidavit, the Court found that the information provided by Det. Hope, both in the affidavit and verbally, was sufficient for the judge to find probable cause. (And even had it not, the Court agreed that the Leon[30] standard of "good faith" would control.)

With regards to Harris' expectation of privacy, the Court looked to his ties to the property. The Court determined that he was a casual, non-overnight visitor, present solely for the purpose of buying drugs. The Court declined to extend the "knock and announce" rule to an interior door that just might have a bathroom behind it, especially since a bathroom is the obvious place to which one would retreat to destroy drugs.

The Court upheld the convictions.

Chapman v. The Higbee Company
256 F.3d 416 (6th Cir. 2001)

FACTS: On February 20, 1997, Lynette Chapman (an African-American woman) was shopping at Dillard Department Store[31] in Cleveland, Ohio. She entered a fitting room at the direction of a sales assistant. In the fitting room, she stated she noticed a sensor tag lying on the floor. She decided not to purchase any of the items, and left the fitting room. The assistant then noticed the sensor tag and notified security. The guard stopped

[28] Confidential Informant
[29] Thomas R. Harris and Aaron L Taylor are co-defendants.
[30] U.S. v. Leon, 468 U.S. 897 (1984).
[31] The Higbee Company does business as Dillard Department Store.

Chapman and sent her back to the fitting room, where he and a female manager checked her purse. The female manager then checked Chapman's clothing. Nothing was found. Chapman pointed out the woman (who was white) who had left the fitting room at the time she entered, but the security guard did not take any action against her. The manager apologized to Chapman, and Chapman left the store.

At the time of the stop, the security guard was actually an off-duty sheriff's deputy. He wore his sheriff's uniform and equipment while working. At no time did he make any attempt to arrest Chapman.

Chapman sued under 42 U.S.C. §1983, claiming state action. Dillard moved for summary judgment, which was granted, because the guard was not "acting under color of state law," but as a private actor. Chapman appealed that motion.

ISSUE: Is an off-duty officer taking an exclusively law enforcement action a state or a private actor?

HOLDING: Private

DISCUSSION: The Court examined the history of private action being considered under the civil rights statute. The Court considered the three tests[32] that have evolved to address the issue. The first, the "public function" test, indicated there was no state action, because the detention of shoplifters is not solely a state function, but that merchants may also perform this action.

Under the "symbiotic relationship/nexus" test, the plaintiff must show "there is a sufficiently close nexus between the government and the private party's conduct," with the state "intimately involved in the challenged conduct." This is a case-by-case analysis. The courts have consistently held that officers who work as security guards are engaging in state action when an officer "seeks to perform official police duties *and*[33] presents himself as a police officer via a statement identifying himself, a uniform, or a badge. The Sixth Circuit, in addition, adds a third test, which looks to the nature of the act performed by the officer.[34]

The Court, in this situation, found that while the deputy was dressed as a public law enforcement officer, he "did not act pursuant to his official duties and thus did not engage in state action," as he did not take any actions that went beyond the scope of a security guard. The Court awarded summary judgment in favor of Dillard and dismissed the federal claim.

NOTE: As a result of the implications in this case, officers are strongly recommended to discuss with their official and personal legal counsel the level of protection they may need in working off-duty jobs for private entities, particularly when in uniform or wearing other indicia of their status as officers.

<u>McGraw v. Holland</u>
257 F.3d 513 (6th Cir. 2001)

FACTS: On the night of February 5-6, 1993, Tina McGraw was one of a group of approximately eight people who were partying at a Michigan home. Tina was 16, but not in school. She also had a young son. During the course of the evening, one of the female party-goers was beaten and raped by several of the male guests. The police were summoned to the house early that morning.

[32] <u>Wolotsky v. Huhn</u>, 960 F.2d 1331 (6th Cir. 1992).

[33] Emphasis in original

[34] <u>Stengel v. Belcher</u>, 522 F.2d 438 (6th Cir. 1975) .

The victim alleged that McGraw and another girl had held her down during the rape. McGraw was arrested at the scene, and her mother was summoned. McGraw and her mother were advised of McGraw's Miranda rights and she signed a waiver form. She was interviewed and her answers recorded.

The recording shows that McGraw was reluctant to talk, but the detective explained that he needed to investigate the crime. McGraw denied being involved, but the detective stated that he did not believe she was being honest. McGraw stated several times that she feared retribution if she talked about the crime. At one point, she stated that she would just "take all the blame." The detective reminded her that she could be tried as an adult and that she faced a life sentence. McGraw asked for a promise that she "go free," but the detective refused to commit to that. Eventually, McGraw gave a full report as to her complicity in the crime. She was convicted and sentenced to 20 to 30 years.

McGraw appealed, stating that she had been coerced and promised leniency. When the Michigan Supreme Court denied her appeal, McGraw brought a habeas case, which was also denied by the federal court, with the judge stating that her reluctance to talk did not present a clear statement that she was exerting her right to silence.

ISSUE: Is a repeated denial of a desire to speak to the officer sufficient to invoke the right to silence?

HOLDING: Yes

DISCUSSION: The federal appeals court stated that McGraw's refusal to talk was unambiguous, and that the prosecution's belief that such refusal was based upon a fear of retaliation was irrelevant. The case reversed McGraw's conviction and granted her request for habeas corpus, unless she can be granted a new trial in a reasonable period of time.

U.S. v. Scott
260 F.3d 512 (6th Cir. 2001)

FACTS: On April 7, 1999, a police informant notified Investigator Jackie Shell (Sequatchie County Sheriff's Office) that he had seen a "large quantity of marijuana growing in an outbuilding" on Scott's property. Shell prepared an affidavit and contacted General Sessions Court Judge Austin, who stated that he would be home (at his house or in the barn) all afternoon and evening and that Shell should bring the warrant there.[35] Shell finalized the affidavit and the warrant, and called Judge Austin, but got no answer. He then attempted to contact Circuit Court Judge Smith, but was told he was out of the county. He apparently made no attempt to contact the other two circuit court judges. He then called Judge Barker, a retired judge who had acted as a Special Judge on occasions, and had signed warrants for Shell before. Barker signed the warrant.

Shell executed the warrant and found 401 marijuana plants and assorted growing equipment. Scott arrived during the search and was arrested. A subsequent search also disclosed 15 firearms.

Shell moved to suppress, stating that Barker was not authorized to sign warrants. The district court found that while that was the case, Shell was working in good faith and the evidence would not be excluded. Scott appealed.

[35] Judge Austin later signed an affidavit indicating that he was in fact at home during that time.

ISSUE: Is a warrant signed by a person not authorized to sign such warrants valid?

HOLDING: No

DISCUSSION: The Court found that the core of the warrant requirement is that it be issued by a "neutral and detached judicial officer." Shell knew that the county was only authorized to have one General Sessions judge, and that was Judge Austin. As such, the warrant was void *ab initio*.[36] Scott's conviction was reversed.

U.S. v. Heath
259 F.3d 522 (6th Cir. 2001)

FACTS: Officer Seelye, a narcotics detective for the Louisville Police Department,[37] first observed Heath in April, 1998. Initially, he had misidentified Heath as another person. However, he watched Heath in activities that indicated that he was involved in narcotics trafficking, so he continued to surveil him. Officer Seelye stated that Heath drove in a suspicious manner, appearing to be looking for a "police tail." He parked and entered an apartment building with a common entrance that required a key.

Officer Seelye investigated and identified the individual he had observed to be Shy Heath, and learned that he had 3 misdemeanor convictions and 1 felony conviction. A week later, he learned from a fellow officer that Heath was reportedly trafficking in cocaine, so he decided to continue his investigation.

Officer Seelye saw Heath on 3 more occasions while Seelye was observing at the complex. On one occasion, he observed another subject at the complex arrive who was driving a Lexus, a very expensive vehicle that was out of place in the neighborhood; he entered the apartment building. Heath arrived soon after and also entered the apartment. Within minutes, the first subject left, appearing to be holding something under his jacket, and departed in Heath's vehicle, leaving the Lexus outside. Another time, he described Heath being described in "countersurveillance," looking around before parking. This time, he removed a pillowcase with a heavy weight at the bottom from the car, went into the building and stayed a short while, before going to his home. While Heath was at his own home, he entertained a number of visitors.

On April 27, 1998, Seelye began surveillance shortly after noon. A few hours later, heath arrived in a vehicle known to belong to Michael Spaulding, a "large-scale drug trafficker." After parking, Heath retrieved a brown bag and went into the apartment building, where he remained for an hour. When he left, he was carrying another bag. Seelye called for assistance and followed Heath for some distance, and the officers decided to do an "investigative stop." As Heath drove into a fast-food restaurant, the officers surrounded him with weapons drawn. Seelye pulled Heath from the car, trapping him with the car door, a protective tactic. He then handcuffed him, fearing that Heath "might want to run." However, he told Heath he was not under arrest.

Seelye explained he was involved in a narcotics investigation and asked Heath about his activities earlier that day. Heath admitted being with Michael Spaulding, but did not admit to having been at the apartment building. The officers searched Heath and the car, and found nothing illegal. However, during the patdown, Seelye had found keys, and asked about them, but Heath stated the pants and the keys

[36] From the beginning.
[37] Louisville Division of Police is the proper name for this agency.

belonged to his brother. Seelye asked if he would "mind if [he] got them since they're not your keys," and Heath agreed.

With Heath in the car, they decided to return to the apartment building and try to gain entry to the apartment building. They contacted a prosecutor about whether it would be alright to just test the doors with the keys, to learn which apartment lock matched the keys.[38] The prosecutor agreed, and the officers returned to the apartment building. At this point, Heath had been detained for over a half-hour.

One of the keys opened the entrance door. Using the remaining key, the officers went door to door, finally running into a resident that indicated that they were likely searching for an apartment on the third floor. They continued trying doors on the third floor until they found a match, that apartment belonged to Carmen Horton (a co-defendant in this case).

The officers decided to contact the owner of the apartment. To minimize the appearance of intimidation, one officer departed, leaving Seelye and Taylor to knock on the door. When Horton answered, they identified themselves as police officers , and their guns were visible. They explained their presence and asked if they could enter, and Horton agreed. They asked her if she had any marijuana, explaining it wouldn't be a "big deal." She turned over a small amount of marijuana, and shortly afterward, signed a search consent form. The subsequent search uncovered scales, wrapper and approximately 3 kilos of cocaine in several packages.

Both Horton and Heath were then arrested. Both parties appealed and requested suppression of the evidence, but the district court denied that motion. Both parties pled guilty, while appealing the matter to the higher court.

ISSUE: May a lengthy Terry stop be considered an arrest?

HOLDING: Yes

DISCUSSION: The Court found that the initial stop was appropriate under the Terry standard of reasonable suspicion, although not enough for an arrest. However, the "real question" was 'whether this stop, valid at its inception, ripened into an arrest before the cocaine was found ...." Using the 2-pronged test developed in U.S. v. Winfrey,[39] the Court agreed that the original stop was appropriate, but agreed with the defendants that the "means and measures utilized by the officers" were not reasonable and resulted in a de facto arrest. The Court did not find fault with the officers having guns drawn and handcuffing Heath.

However, the Court stated that once their original concerns were satisfied, they were "obligated, indeed mandated, to end their investigative stop absent a *newly discovered*[40] articulable basis for [Heath's] detention." The government claimed that Heath's false statements regarding his previous activities raised a reasonable suspicion, and the district court agreed, but the appellate did not. Heath made those statements prior to the search of the vehicle, and the search disclosed nothing; "Heath's statements cannot be used to breathe life into a dying investigation." The Supreme Court has stated that "unless the detainee's

[38] With the locked front entrance, they had been unable to determine which apartment Heath had visited.

[39] 915 F.2d 212 (6th Cir. 1990).

[40] Emphasis in original

answers provide the officer with probable cause to arrest him, he must be released."[41] As a result, Heath's detention past that point was illegal. The Court did not find it necessary to address the length of Heath's detention from that time.

The Court did choose to address the officer's use of the keys. While the district court stated the Heath consented to the removal of the keys, the appellate court pointed out that there is a "wide chasm" between removal and use, and that it did not make the officer's use of the keys at the apartment building legal.

Finally, the Court addressed Heath's standing to object to the search of the apartment. The Court discussed the history of the concept of a visitor/guest having any expectation of privacy in the apartment of another. In this case, evidence indicated that Heath slept at the apartment on a weekly basis, and that he had "unfettered access to the apartment." In addition, heath and Horton are cousins. Therefore, the appellate court held that Heath did have a legitimate expectation of privacy in the apartment.

Even if they had arrived back at the apartment building legally, they would still be barred from entering. The Court placed "particular significance" in the fact that they officers did not have probable cause to arrest either defendant prior to the officers' entry into the apartment building. However, just because the officers had a key, that did not make the entry valid.[42]

[41] Quoting Berkemer v. McCarty, 468 U.S. 420 (1984).

[42] The Court pointed out that the government could not, on one hand, argue that Heath did not having standing to contest the search of the apartment, and on the other hand, state that he could authorize their entry into the apartment by handing over the keys. The Court suppressed the evidence found during the search of the apartment.

U.S. v. Suarez
263 F.3d 468 (6th Cir. 2001)

FACTS: Det. Sgt. Robert Suarez was a veteran officer of the Dearborn (Michigan) P.D. He was an acknowledged expert on "Gypsy[43] crime."

Suarez became involved, however, in a series of criminal activities with the Gypsy communities – serving as the middleman to recover monies for victims, but taking a substantial "cut" for himself as well, while allowing the criminals to remain free. Eventually, the relationship of officer to informant became one of partners.[44]

When Suarez was confronted about his criminal activities by the FBI, he was at the Dearborn P.D. station. The president of the police union, Sgt. Huck, informed Suarez that he was getting a police union lawyer to represent him, to which Suarez replied, "O.K." Huck arranged for the attorney to meet Suarez at the FBI headquarters, and told Suarez this before they left the police station. Suarez was given his Miranda rights and a written Waiver of Rights, which he signed. On the way to the FBI headquarters, Suarez was asked if he wished to speak, and he stated that yes, he wanted to "clear this up." He discussed several payments he had received and other matters prejudicial to himself. Later, he claimed these

[43] While often considered a derogatory term used toward those of Romany descent, however, the Court elected to use this term throughout the case.

[44] The various crimes committed by Suarez will not be outlined in detail, but consisted primarily of converting stolen property he recovered for his own benefit. The facts of the actual crimes do not factor into this summary.

statements to have been taken in violation of his right to counsel, but the district court denied his motion to suppress the statements made during this ride. Later, Suarez and his attorney gave a lengthy proffer that was made under a limited grant of immunity, but was not to be used in the sentencing decision.

At trial, Suarez was acquitted of all but two charges of unlawful conversion, but several enhancements to his sentence were made because of aggravating factors. Suarez appealed.

ISSUE: Is the awareness that counsel is being provided by another entity an invocation of the right to speak with counsel?

HOLDING: No

DISCUSSION: Once a criminal defendant has requested counsel, the police may not initiate further interrogation. However, the request must be clear, and must be specific, that the defendant wishes an attorney. Suarez claimed that the FBI question of "do you want to talk" was not a clarifying question, which might be permissible, although the Court presumed that the FBI agents did hear that Suarez had agreed to police counsel. The Court stated that simple awareness that a suspect has an attorney, or would soon have one, is not enough to clearly assert a defendant's desire to talk exclusively through an attorney. While the Court agreed that the agents may have more properly stated, "would you like to talk to us without counsel," that their failure to do so is not a fatal defect.

The Court stated that even if it had been error to admit the statements made, it was harmless error, as it would have been unlikely to have had a "substantial and injurious effect or influence" on the jury.

Dudley v. Eden
260 F.3d 722 (6th Cir., 2001)

FACTS: On April 5, 1996, at approximately 4:30, Dudley entered the Eastlake (Ohio) Bank One branch and demanded money from the teller. The teller handed over the money, and Dudley left in a stolen green BMW. He went to a lot behind Manny's Bar and waited for police. His intention was to commit suicide by way of police intervention.[45]

Eastlake P.D. responded to the bank's call about the robbery. The dispatcher broadcast the information and the location of the suspect. Officer Lewis arrived and ordered Dudley out of the car, holding him at gunpoint, but Dudley refused to get out. Officers Krozack and Angelo arrived. They attempted to open the car doors, but they were locked. Lewis tried to reach inside, but Dudley fled. The officers shot at his tires and hit at least one.

Officer Eden saw Lewis beside the car, and then saw Dudley accelerate out of the lot. He heard shots being fired. He did not see who was shooting or why. He saw Dudley was driving recklessly, swerving across traffic. Eden pursued Dudley. At this point, the facts diverge, with Dudley stating that Eden "cut him off" and that Eden began shooting just as he came to a stop. Eden however, stated that Dudley rammed his driver's side door and that as they slowed, Eden fired 3 shots into the car. He also stated that he could not see Dudley's hands and that he feared for his safety and that of the general public.

Officers Krozak and Lewis arrived on foot. They searched Dudley and found the bank money, but did not find a weapon. They

[45] "Suicide by cop."

summoned paramedics who transported Dudley to the hospital; he underwent surgery for the gunshot wound. He was also "detoxified," because his blood alcohol was .30 upon admission.

In 1998, Dudley sued under 42 U.S.C. §1983 claiming that Eden and the other officers violated his Fourth Amendment rights against unreasonable seizure by using excessive force. He also brought related state claims. The officers requested and received summary judgment against Dudley, but the court did not choose to exercise jurisdiction over the state claims. Dudley appealed the dismissal as regards to Officer Eden.

ISSUE: Is shooting at a fleeing felon ever permitted?

HOLDING: Yes (under some circumstances)

DISCUSSION: The Court discussed the use of deadly force against a fleeing felon. While the Court agreed that usually, such force would likely be impermissible, that even the Garner[46] acknowledged that there might be times where deadly force might be allowable, if the police reasonably believe that a suspect poses "a threat of serious physical harm to themselves or other members of the community." In Graham v. Connor,[47] the Court emphasized that the inquiry must be based on the "totality of the circumstances" and must focus on the specific facts of each case. Directly on point to this situation is Smith v. Freland,[48] where a fleeing, unarmed motorist rammed an officer's car in an attempt to flee; the officer fatally shot him. The Court found the officer's actions reasonable.

[46] Tennessee v. Garner, 471 U.S. 1 (1985).
[47] 490 U.S. 386 (1989).
[48] 954 F.2d 343 (1992).

While Dudley argued that he did not engage in an aggressive behavior, the court found otherwise. It was reasonable for the officers to believe he was armed, as most bank robbers are, and his reckless flight only confirmed his dangerousness. Even the collision did not necessarily end the potential threat, as Dudley could still have left the scene. (The position of the cars also gave Dudley a clear shot at Eden.) It was reasonable for Eden to believe him a serious threat and take action accordingly.

The Court affirmed the grant of summary judgment in favor of the officers.

NOTE: Agencies are advised to review their deadly force policy, however, to ensure that their agency policy is in accord with the principles in this case.

U.S. v. Mick
263 F.3d 553 (6th Cir. 2001)

FACTS: Mick is a bookmaker living in Alliance, Ohio. According to his girlfriend, Harriet Brodzinski, he had been a bookmaker since at least 1984, and that it was the sole source of their income for a good part of that time. Until May, 1997, he ran a bookmaking operation out of a house trailer, which had several telephone lines, all listed in the girlfriend's name. At least one line was attached to a fax machine. During the two months prior to his arrest, the FBI ran a pen register[49] on each line. During this time, 3,400 calls were made on the fax machine, most of them outgoing, 4,000 calls were made on one telephone line and over 2,400 calls on the third, most of the voice calls were incoming.
Investigation showed that in order to maximize his business, Mick had Cheryle Stoiber, a friend in Louisville, place a

[49] A pen register records the telephone numbers of calls made to and from the affected telephone.

telephone in her home that would automatically call-forward to his number. (This would enable Louisville area bettors to make local telephone calls to him.) Mick paid for the telephone in her home.

Usually Mick or Brodzinski answered the phone, but occasionally, Mick's two sons, Robert and Shawn, assisted as well. Bets were entered into the computer and the handwritten records destroyed. Mick took bets on all major sporting events. His customers included both individual bettors and other bookmakers.

In 1995, the Stark County Sheriff's Office and the Ohio State Police began to investigate reports about Mick. For several years, Canton police and the FBI occasionally surveilled Mick's activities. He was observed going to the trailer, then making stops at various locations in Alliance and Sebring. They also inspected his trash, finding parlay sheets and betting slips.

On May 27, 1997, Agent Mihok of the FBI prepared an affidavit to support a search warrant request for Mick's house, trailer and safety deposit box. The affidavit listed several unnamed sources that provided pieces of information, as well as the results of the pen register and the surveillance.

Based upon the affidavit, the magistrate judge issued a search warrant. The search of the house uncovered vast amounts of evidence and over $550,000 in cash. The trailer yielded more records, while the safety deposit box contained over $127,000 in cash.

Mick was charged with a myriad of federal charges. He was convicted on all 72 counts, and appealed.

ISSUE: Do misstatements in a warrant require the invalidation of the warrant?

HOLDING: No

DISCUSSION: Mick claimed that the search warrant affidavit "contained misleading information," and that it was not sufficient to assess the informant's knowledge or reliability. He argued that the affidavit did not meet the standard for probable cause.

The Court found that there was "much more than sufficient evidence" to believe that there would be contraband at the locations named. While Mick pointed to several misstatements in the affidavit, and claimed that the "false and misleading" statements made the warrant fatally defective. However, while acknowledging that there may have been misstatements in the affidavit, they were not given knowingly or in bad faith. Even without the challenged statements, the affidavit would have still contained sufficient information to support the warrant.

Mick also challenged the use of the three unnamed informants, stating that the affidavit did not provide enough information for the magistrate to judge their credibility. However, the court found that the "general theme" in the statements of the informants, that Mick was "well-connected and well-traveled in the gambling world," was corroborated by other information gathered by the agents. That any money he might have garnered in his bookmaking activities would be held in the more secure locations of his home and safety deposit box was logical.

The Court upheld the lower court's refusal to suppress the contested evidence.

U.S. v. Smith
263 F.3d 571 (6th Cir. 2001)

FACTS: On May 13, 1999, Steven and Randy Smith[50] were traveling through Tennessee in a rental car. Steven was driving and Randy was in the front passenger seat. Officer Fulcher, along with his drug dog, Lacy, were patrolling the interstate and Fulcher observed the vehicle speeding. He followed the vehicle and watched it cross onto the shoulder twice in a short distance, and he pulled the vehicle over.

He suspected immediately they were driving a rental, and when he reached the driver, the driver handed him a rental agreement. Fulcher also asked for his operator's license. At this time, he saw that Randy had sat up, and was raising his seat to an upright position. Randy appeared to be "stoned" and had a white froth around his lips. He asked if he'd been asleep, and Randy Smith agreed that he had. Fulcher saw food wrappers and beverage cans, and also detected body odor, indicating the men had not bathed recently.

The rental agreement was in the name of Tracy Smith, and neither Steven nor Randy were listed as authorized drivers. Steven's address was the same however, as that on the rental agreement, and Steven told Fulcher that Tracy was his wife.

Steven explained that they had been on a trip to Arkansas on business. Fulcher went to his car to write a warning citation. When he returned with the citation, he advised Steven that he should be listed as an authorized driver the next time. He also asked if they had any weapons or narcotics in the car, which Steven denied. However, Fulcher testified that Steven appeared nervous and would not look at him.

Fulcher asked for consent to search the car, which was denied. He asked both men to get out of the car, and ran Lacy around the car. She hit on both doors, and Fulcher allowed her to enter the car, where she alerted on a black canvas bag on the back floorboard. The bag was later found to contain a large quantity of methamphetamine, amphetamine and cocaine. Both men were arrested. During a further search, a loaded handgun and extra magazine was found, as well as receipts from California. In the trunk, they found scales and wrapping paper, and other paraphernalia.[51]

Both men were convicted of a variety of federal narcotics and weapons charges. They filed to suppress the evidence, and initially the court granted the motion with respect to Steven, but not with regards to Randy, finding that he did not have standing to challenge the legality of the search.

ISSUES: 1) May a non-authorized driver in a rental vehicle expect privacy in that vehicle?

2) Is a refusal to consent enough to further detain a subject for questioning?

HOLDINGS: 1) Yes, under some circumstances.

2) No.

DISCUSSION: The court addressed the technical issue of standing, which was essentially rejected in Rakas v. Illinois.[52] Instead the court agreed that the appropriate measure is whether the defendant had a "legitimate expectation of privacy" in the area, and stated that was a "prerequisite to challenging assertedly unlawful police conduct." The Court stated a two-part

[50] As both men share the same last name, for convenience and clarity, they will be referred to by their first names.

[51] During a later search of Steven Smith's house, officers found $21,000 in cash.

[52] 439 U.S. 128 (1978).

analysis: 1) did Smith have an "actual, subjective expectation of privacy" and 2) was that a "legitimate, objectively reasonable expectation?"

The District Court found that Steven Smith did have such an expectation, as he had made the arrangements for the rental, although his wife had picked up the car. He had an intimate relationship with the individual that rented the vehicle and gave him permission to use it. However, the appellate court gave great weight to an earlier unpublished opinion, which stated that unauthorized drivers do not have such an expectation of privacy.[53] The Court further discussed a number of other cases, distinguished the facts of the present case, and determined that this case was different, in that the driver was a licensed driver (unlike many of the other cases), that the driver had a close, personal relationship with the actual renter and that he also had a business relationship with the rental company, as his credit card was billed for the charge.

So, while he may have been in breach of the rental contract, it was not illegal for him to drive the rental vehicle, and he had both a subjective and an objective expectation of privacy in the vehicle.

Turning to the detention, the Court agreed (and Smith did not contest) that there was reasonable suspicion for the initial stop. Again the Court engaged in a lengthy discussion of the sorts of indicia that may create a reasonable suspicion of illegal activity. In this situation, the Court placed little weight on Steven's nervousness, stating that many drivers "whether innocent or guilty" are nervous in the presence of a law enforcement officer. However, Steven's change in demeanor and increase in nervousness during the questioning following the issuance of the warning citation were more important, as it was the length of detention and questioning following the issuance of the citation that was in dispute.

The Court addressed each factor given by the officer to support his further suspicion. Since the officer did not pursue the question of Steven's authorized use of the vehicle, that was not considered a substantial factor. Neither did the officer explore the men's stated travel plans to find discrepancies, or explore Randy's condition. The Court placed little weight on the litter in the vehicle or the men's body odor, although agreeing that this indicated to the officer than the men had "maintained a continuous presence in the vehicle," which might suggest criminal behavior.

The Court concluded that Officer Fulcher did not have sufficient reasonable, articulable suspicion to further detain the Smith's after issuing the citation. The Court suggested that "it seems that it was Steven's refusal of consent to search which triggered Officer Fulcher's decision to use the narcotics dog" and "[t]hat refusal is clearly not an appropriate basis for reasonable suspicion."

The Court determined that all evidence should be suppressed.

Northrop v. Trippett
265 F.3d 372 (6th Cir. 2001)

FACTS: On August 29, 1990, an anonymous tip to Detroit police indicated that "two black males, one wearing a green 'Used' jeans outfit, were selling drugs at the Greyhound Bus Station." That tip was passed on to Officers Jackson and Collins. They observed two males "sitting and talking." one dressed as indicated. The other man was the petitioner, Northrop.

[53] U.S. v. Frederickson, No. 90-5536, 1990, WL 159411 (6th Cir. 1990).

As Jackson and Collins approached, Northrop slipped a duffel bag from his shoulder and shoved it under the seat. He then got up and tried to walk past the officers, but Collins stopped him. He was asked for ID, then to empty his pockets, which he did. Collins asked if he had any drugs, and he admitted to marijuana in his sock. He was arrested. The officers then seized the duffel and found a large quantity of cocaine. Northrop was eventually convicted.

Northrop filed an appeal, which was denied, and he subsequently filed a habeas petition, claiming ineffective assistance of counsel in failing to raise questions about the validity of the stop and subsequent search. The District Court granted the writ, and the Warden, Trippett, appealed.[54]

ISSUE: Is a duffel bag in close proximity to the arrested person subject to search incident to arrest?

HOLDING: Yes (but ...)

DISCUSSION: The Court found that the search of the duffel, which they had witnessed in the possession of Northrop, to be lawful. However, conversely, the Court also found that the officers did not have sufficient reason to stop Northrop originally, admitting that they did not observe any illegal activity but were working solely based upon the tip they had received. While certain tips may be sufficient reason for a Terry stop, the Court stated that would only be the case when the police knew a tipster to be reliable and/or when the tip "contains independently verifiable details showing knowledge." Neither was present in this situation. As such, the Court found that the circumstances of the original stop "rendered the cocaine evidence inadmissible." The Court concluded that Northrop's attorney should have tested the seizure and that there was no "tactical cost" to the case in doing so. The Court upheld the issuance of the habeas writ based on ineffective assistance of counsel.

U.S. v. Johnson
267 F.3d 498 (6th Cir. 2001)

FACTS: On April 1, 1999, Det. Hart, of the Lexington police, completed an affidavit stating that an informant had reported crack cocaine was being sold from a particular house in Lexington. Det. Hart vouched for the reliability of the informant, and requested a no-knock warrant, because the informant stated that "deals inside the house are usually done near the bathroom." In addition, Det. Hart stated that drug transactions usually involve firearms. Finally, Det. Hart stated that the informant had made a controlled buy in the previous 48 hours and had made 9 previous controlled buys, and that other pieces of information provided by the informant had been independently corroborated.

The judge issued the warrant based upon this affidavit. Johnson requested a motion to suppress, acknowledging in that motion that the warrant was designated "no-knock." (Later, Johnson would claim, conversely, that the warrant did not give the officers the authority to enter without knocking.) The Court declined to suppress the evidence, and Johnson appealed.

ISSUE: Must a no-knock warrant give detail to justify its issuance as such?

HOLDING: Yes

DISCUSSION: Although more than "mere suspicion" and "boilerplate language" is

[54] Habeas petitions customarily list the custodian of the prisoner, in this case the prison warden, as the respondent.

needed to justify a no-knock warrant, the Court concluded that Det. Hope had made sufficient cause to obtain such a warrant. He specified, in enough detail, why such a warrant was advisable under the particular circumstances of this case.

The Court upheld Johnson's conviction.

U.S. v. Emuegbunam
268 F.3d 377 (6th Cir 2001)

FACTS: On June 16, 1998, Chuks Emuegbunam[55] was indicted on conspiracy to import heroin. Emuegbunam is a citizen of Nigeria who was arrested by Canadian authorities. Defending himself pro se,[56] Emuegbunam made a number of pre-trial motions, all of which were denied, and was eventually convicted.

One of Emuegbunam's claims was that federal officials violated his rights guaranteed by the Vienna Convention on Consular Relations, which requires that foreign nationals (aliens) must be notified of their right to contact their consulate upon arrest, and in same cases, requires that the consulate be notified even if the individual does not want the consulate informed.

Originally, when the U.S. District Court received Emuegbunam's complaint, the court instructed the prosecutors to make the notification, and they did so. Upon a request to Nigerian officials to assist in procuring witnesses and other information from Nigeria, Emuegbunam was informed by the embassy that because of the short time limit before the trial, it would not be possible for witnesses to obtain the necessary documents to travel to the United States. As a result, Emuegbunam claimed prejudice in his subsequent trial. The District Court, while stating they did not believe there was sufficient prejudice, offered to delay the trial to allow time for the witnesses to arrive, but Emuegbunam declined and the trial proceeded.

ISSUE: Does a violation of the Vienna Convention on Consular Relations give a private right of action to the aggrieved foreign national?

HOLDING: No

DISCUSSION: In coming to its opinion, the Sixth Circuit examined the history of treaties in general and the Vienna Convention on Consular Relations, in particular. It found that "as a general rule … international treaties do not create rights that are privately enforceable in the federal courts." However, it acknowledged that some treaties specifically do create private rights of action. An earlier U.S. Supreme Court case, Breard v. Greene,[57] did not completely resolve the issue as to whether this treaty created individual enforceable rights. However, the Sixth Circuit concluded that it did not create a right that could be enforced by individuals, but only by the state,[58] although the Sixth Circuit acknowledged that absent a decision by the Supreme Court, the federal courts had come to a variety of decisions regarding this issue. The U.S. State Department has taken the view that the treaty does not create an individual right, but that "the only remedies for failures of consular notification under the Vienna Convention are diplomatic, political, or exist between states under international law."[59] The Court also stated that, in previous cases where a violation of the right

[55] There are different spellings of both Chuks and Emuegbunam throughout the case, this is the variant selected by the federal court.
[56] Without legal counsel

[57] 523 U.S. 371 (1998).
[58] In treaty terminology, "state" actually refers to the country that is aggrieved by the action of another country.
[59] Quoting U.S. v. Li, 206 F.3d 56 (1st Cir., 2000)

was claim, the State Department typically investigated and issued apologies to the foreign governments, and worked with domestic law enforcement to prevent future violations.

The Court discussed, first, whether dismissal of the indictment was an appropriate remedy for a violation of this sort of treaty violation, and it found that it did not. The Court then moved on to whether the reversal of the conviction was appropriate, and again, found that the reversal of a conviction is not an appropriate remedy for a violation of treaty rights.

NOTE: While the Sixth Circuit did not find that foreign nationals have <u>individual</u> enforceable rights in the federal criminal courts, it remains that it <u>is</u> a violation of a treaty to fail to notify a foreign national under arrest of these rights. Violations of treaty are often brought before the World Court at The Hague, Switzerland. Kentucky law enforcement officers are strongly encouraged to make such notifications when appropriate.

<u>Mitzel v. Tate</u>
267 F.3d 524 (6th Cir. 2001)

FACTS: On January 12, 1987, the Niles, (OH) P.D. received several telephone calls from Robert Mitzel. He was concerned that his friend, Randy Ralston, may have committed suicide earlier in the day.[60] Although the information presented during the calls was somewhat inconsistent, the officers did learn, through the course of 4 calls, that 1) the caller had been with Ralston that day, 2) that Ralston had talked of suicide during the day, and 3) that Mitzel had dropped Ralston off at a specified location earlier that afternoon. Mitzel has also indicated that Ralston had "mentioned using either a .22 caliber rifle or sleeping pills" and that he had asked for Mitzel's help to commit suicide that morning.

With this information, Niles P.D. officers went to the location specified by Mitzel. They found tire tracks and two sets of footprints leading into nearby woods, but only one set leading out. In the woods, they found Ralston's body, with two gunshot wounds to the head. They also discovered five expended .22 caliber shotgun shells.[61]

Captain Jacola, who had gone to the crime scene, returned to the station to find Mitzel there. Before speaking with Mitzel, Jacola read Mitzel a "rights waiver" form and had him initial and sign it, and Officer Wilson witnessed the form.

In his first statement, Mitzel explained that Ralston has asked Mitzel to "kill someone" for him, but only later that morning had Mitzel realized the "someone" was Ralston himself. Later that day, he dropped Ralston at the location he had specified.[62] Jacola left to check on the consistency of this information with what Mitzel had revealed in his earlier telephone calls. He returned to ask Mitzel to repeat his story, and Mitzel revealed more details and drafted a written statement, after signing another rights waiver form. In this statement, Mitzel revealed that he had, in fact, gone into the woods with Ralston, who asked him to shoot him, but Mitzel refused. At that point, Ralston grabbed the weapon and shot himself once. Mitzel stated that he offered to call an ambulance, but Ralston

[60] Mitzel was 18 and Ralston was 17.

[61] While the shells were referred to in the case as shotgun shells, other information in this opinion indicates that the weapon was, in fact, a rifle.

[62] There was independent evidence that Ralston had, in fact, intended to commit suicide, as he had left a suicide note and had stolen a large number of pills he thought to be sleeping pills from his grandmother. Instead, however, they were found to be laxatives.

refused, again asking Mitzel to shoot him. Mitzel complied, shooting him in the head, and then went home and called police. Yet another statement was drafted, adding details such as that the rifle was Mitzel's, and they had gone together to purchase the ammunition. Mitzel signed the statement.

Then, Captain Jacola asked him to videotape a statement. Mitzel signed yet another rights waiver. In the videotape, he added further details, such as that he (Ralston) had loaded the weapon and had cocked and aimed it, but that he was unable to pull the trigger. Mitzel admitted to holding and aiming the weapon for Ralston to fire the first shot.

Atomic absorption tests were taken, and indicated that Mitzel did not have sufficient residue to have likely fired a weapon, but that Ralston did. However, Mitzel admitted to have taken a shower after the shooting.

The next morning, Mitzel was taken before a judge. His father had hired an attorney to represent Mitzel, and he appeared at the hearing. The police asked Mitzel, through the attorney, if Mitzel would take a polygraph, and they agreed, but the attorney stated that he could not be present. After the test, Mitzel was told by the police that the test indicated he had not told "the whole truth." Mitzel stated he wished to tell them the truth. The officers asked if he wished to have his attorney present, but he declined, and signed another rights waiver statement to that effect.

In this last statement, Mitzel admitted that he helped Ralston place his thumb on the trigger, and that Mitzel in fact helped Ralston depress the trigger.

Mitzel moved for suppression of all statements, and was denied. The pathologist testified that both bullet wounds were the cause of death, but could not determine if death would have occurred had not both shots been fired.

Mitzel took the stand and essentially repeated his statement that Ralston fired the first shot, and admitted that when he shot Ralston, he was conscious and talking. He was convicted of murder with a firearm.

Mitzel made a habeas appeal to the District Court, which was denied. He then appealed, on several issues.

ISSUE: May officers initiate discussion with a suspect following a polygraph without the suspect's attorney being present or giving permission?

HOLDING: No

DISCUSSION: The Court looked at the whether the officers' initiation of the post-polygraph interrogation was proper, without Mitzel's attorney being present. Although they declined to grant Mitzel's habeas petition on that basis, the lower court (the magistrate and the judge) both agreed that it was not proper, but that the error was harmless. The Court stated that the key question in this case was who initiated the post-polygraph interview, Mitzel or the police. If the police, then Mitzel's waiver of counsel following the start of the interrogation would be invalid, and admission of this statement would be a violation. If Mitzel initiated the interview, it may not be a violation.

The magistrate judge, in his recommendation to the district judge, placed great weight on the fact that Mitzel's attorney had not given them permission to speak to Mitzel after the polygraph, and that the police did not return Mitzel to the jail, but to their office.

The appellate court agreed with the lower courts that the interview was initiated by the police, but also agreed that any impact made

by the last statement did not "substantially affect or influence the jury's decision" to convict Mitzel of murder, given his admission that he fired the second shot himself.

Mitzel's habeas petition was denied.

Moore v. City of Harriman
272 F.3d 769 (6th Cir. 2001)

FACTS: In April, 1997, Moore sued the City of Harriman (Tennessee) and a number of officers for excessive force. The complaint did not specify whether the officers were being sued official or individually. The officers were granted a dismissal. Due to procedural issues, the federal complaint was dismissed, although Moore was allowed to amend and reinstate the state law claims.

ISSUE: Is failure to explicitly state whether a complaint is made "officially" or in an officer's "individual capacity" a fatal defect in making a claim against an officer individually?

HOLDING: No

DISCUSSION: The Court looked at the "course of proceedings" to determine if the officers were given sufficient notice that they were facing individual liability. The Court found that the complaint referred to the officers as individuals. Other statements in documents filed during the proceedings were similar in referring to the officers' individual liabilities. In addition, state claims were also made that indicated the officer's were facing individual liability for their conduct.

NOTE: Agencies are advised to review their policies in working with officers facing lawsuits, to ensure that the officers are covered both as government agents and as individuals.

U.S. v. Saari
272 F.3d 804 (6th Cir. 2001)

FACTS: On March 14, 1999, Memphis (Tennessee) officers were dispatched to a call of "shots fired," at the home of Saari's ex-wife, Anne. Upon arrival, the officers learned that shots had not been fired, but that Saari had been seen standing in front of Anne Saari's house, apparently holding a pistol. She informed the officers that Saari was "armed at all times." Officer Currin testified that he had also been informed, by another party, that Saari possessed explosives. Another officer, Cleveland, disclosed that he had been advised by a source that Saari "belonged to a militia group and was heavily armed."

The officers proceeded to Saari's apartment. The officers approached the apartment carefully, with Cleveland carrying a shotgun at the "low ready" position and Currin having his handgun drawn. Officers Bridges and Bateman also had weapons drawn during at least part of the arrest.

Cleveland and Currin knocked on the door, and Saari answered. Saari stated that he remained inside the apartment, at the open door, but that the officers ordered him outside. (The officers could not recall if they, in fact, ordered him out, or if he just came out, but agreed that they would not have allowed him to stay in the apartment.) He kept his hands up to his head. The officers asked if he was armed, and he directed them to a weapon he carried in his waistband. He was cuffed, and the officers entered the apartment with him.

Although Saari objected, the officers searched the apartment, finding weapons and ammunition. They did not take the weapons immediately, but returned several days later with a warrant based upon what they had observed. (No weapons had been

observed in plain view upon their entry, although several ammunition boxes were visible.)

Saari was charged and convicted of having weapons and ammunition following the issuance of a protective order. However, the trial court suppressed the weapons found during the search. The prosecution appeals, asking the Court to allow the admission of the gun found in Saari's waistband. Saari argued that he was not voluntarily in a public place, as the officers' actions effectively placed him under arrest from the beginning of the encounter.

ISSUE: May an officer summon an individual out of a home into a public place, for an interview, based only upon reasonable suspicion that a crime has occurred?

HOLDING: No

DISCUSSION: The Court distinguished this case from U.S. v. Morgan.[63] In this situation, the Court agreed that it would not have been reasonable for Saari to believe that he had any choice in leaving the house, and the Court was unable to find any exigency that required that the officers gain entry immediately. From the facts, there appeared to be sufficient time and evidence for officers to obtain an arrest warrant for Saari.

The suppression was upheld.

Watkins v. City of Battle Creek
273 F.2d 682 (6th Cir 2001)

FACTS: On February 19, 1997, Battle Creek officers executed a search warrant on the home of Watkins and his girlfriend, Alford. As they entered, they found Watkins in the walk-in closet, a plastic bag with white debris nearby. One piece was identified later as crack cocaine.

Both were handcuffed. Watkins was licking his lips, and the officers saw a "pink foamy drool" coming from his mouth. One officer observed a white speck on his face. They asked if he had swallowed drugs, which he denied. The officers warned Watkins of the risk of swallowing drugs, that it might prove fatal, but he repeatedly declined, stating that he had struck his face on the bed while being arrested. He declined all medical treatment. At the jail, Watkins appeared to be intoxicated and complained of an upset stomach. Again he was asked about swallowing drugs, and again denied. The officers in both instances told him that he would not face any additional charges by admitting that he had done so. (The jail deputies had not been informed of the suspicions of the arresting officers.) During the night, Watkins was placed in a cell where he could be monitored. Later he complained about feeling sick, and the deputy stated he would check on him regularly and wake him if necessary, but the deputy did not do so. However, other deputies observed Watkins moving around during the night. At 5:30 a.m., they found Watkins unconscious and not breathing. They began CPR and summoned aid, but he was pronounced dead at 5:56 a.m.

Watkins' executor filed a civil rights lawsuit against the arresting officers and the jail personnel, claiming them to be "deliberately indifferent to Watkins' serious medical needs."

ISSUE: Must an agency force medical treatment on a detainee who refuses it?

HOLDING: No

DISCUSSION: The Court found that the officers and jail personnel were at best,

[63] 743 F.2d 11580 (6th Cir, 1984).

simply negligent, and that was insufficient for a civil rights lawsuit. The court found no evidence that any of the personnel were indifferent to his needs by not forcing him to accept medical treatment.

U.S. v. Graham
275 F.3d 490 (6th Cir. 2001)

FACTS: Graham and a friend, Huggett, were regular users of marijuana. At trial, Huggett testified that he and Graham and begun to sell marijuana in 1988, and that they began to raid patches of marijuana grown by others. In 1989, they started to grow their own, first indoors, then in a nearby swamp. In 1994, they harvested about 40 pounds of marijuana, although in most years, it was much less. After local police seized their marijuana and weapons in 1995, they purchased a trailer in which to grow marijuana. The trailer was set up next to Graham's residential trailer.

In 1996, they harvested over 20 pounds. In 1997, they planted 7 plots of marijuana in the swamp, and later that year, the Southwest Drug Enforcement Team seized 6 of the 7 patches. Huggett also testified that Graham would sometimes carry a gun, and that Graham used the money from these activities for living expenses and to purchase weapons.

In the early years of their drug growing operations, both men had been members of the Michigan Militia Wolverines. They were expelled because they were advocating violence against the government. In 1996, they and others formed the North American Militia (NAM) to "prepare for a war with the government and eventually overthrow the government." Graham was not a leader, but was an active member of the organization. At meetings, they discussed various ways to commit an offensive, "first strike" against the government, setting several dates to do so. Agent Stumpenhaus, working undercover for the BATF, infiltrated NAM and attended a number of meetings. He determined that NAM had stockpiled weapons, held paramilitary training, selected various specific targets[64] in the area and plotted strategy. They anticipated that other militias would rise up and join them after the initial attack. The agent also learned of the structure of their organization, which was divided into a number of 3-person cells. Graham was the leader of a cell, and reconned his assigned region. He made a number of statements to the agent to the effect that he was ready to attack and kill.

During the summer of 1997, the government tapped Carter's[65] phone. They intercepted a number of phone calls in which Graham stated that he possessed weapons and was willing to use them against federal agents. Federal agents executed a search warrant on Metcalf's[66] property, which was described as a "miniature military compound," fortified with bunkers and including a firing range. They seized a vast quantity of weapons, explosives and military equipment and manuals. However, even after this seizure, NAM members continued to meet.

On March 17, 1998, a search warrant was issued for Graham's trailer as well as an arrest warrant. The next day, federal agents searched the trailer and found a variety of weapons, marijuana seeds and seedlings, and a variety of combat-related items. They also performed a warrantless search of his truck, also seizing weapons and drugs.

Graham was charged with a multitude of federal charges. He asked for suppression

[64] Targets were specified as "hard," meaning structures and locations or "soft" meaning people.
[65] "Colonel" Ken Carter was the leader of NAM.
[66] Bradford Metcalf was NAM's second-in-command.

of the items taken from his home, stating that the supporting affidavit was not enough for probable cause to believe that criminal activity was occurring in that location. He also asked for suppression of the evidence from the truck.

ISSUE: Is a specific exigency required for a Carroll search?

HOLDINGS: No

DISCUSSION: The government successfully argued that Graham's criminal activity and repeated claims established probable cause that weapons were in the home. In fact, the 40-page affidavit "provided an extensive roadmap" of NAM's activities and Graham's participation in these activities. Each piece of the evidence corroborated and supported one another.

With regards to the evidence in the truck, Graham stated that there was no authorizing warrant, that he did not consent, and that the officers did not have probable cause of the search. Graham pointed to Coolidge v. New Hampshire[67] as controlling, because he was already out of the truck at the time it was searched, and that the truck was not capable of movement. However, the government stated that it needed no special exigency to justify a vehicle exception search based on probable cause. The Court examined a number of cases, Carroll v. U.S.[68] and its progeny, and decided that the agents did have probable cause and that no specific showing of exigency need be shown. The Court upheld the search.

Graham also argued that various exculpatory statements he had made, indicating that he didn't want "innocent people to die," should have been included in the affidavit, and that failure to do so required a Franks hearing.[69] The Court denied the motion that Franks hearing was required.

Klein v. Long
275 F.3d 544 (6th Cir. 2001)

FACTS: On June 10, 1998, David and Therese Klein were arguing about the disciplining of their children. They were further arguing about a trip planned for the weekend. Later than evening, the argument escalated, and Therese Klein went into the kitchen to make a telephone call. David Klein thought she was calling a friend and grabbed the telephone from her.

Therese Klein left the house and drove to a telephone. She called 911 and reported that her husband had been "grabbing and pushing" her and the two boys. She was crying during the call.

Officers Long and Rogers of the Blackman Township (Michigan) responded and met Therese Klein at the front of the house. They saw that her finger was bleeding, scratched when David Klein grabbed the telephone from her earlier.

Entering the house, they found David Klein and Jeffrey, one of their sons, doing the dishes. Mr. Klein was sent to the garage while Rogers further questioned Therese and the boys. She repeated her story. She said that her husband "just needed to leave the premises for the evening and cool down."

Rogers placed David Klein under arrest for domestic assault; he stayed in jail for 20

[67] 403 U.S. 443 (1971)
[68] 267 U.S. 132 (1925)

[69] Franks v. Delaware, 438 U.S. 154 (1978) - an evidentiary hearing to examine the validity of a search warrant alleged to contain misstatements and omissions.

hours. The prosecutor decided against continuing the prosecution.[70]

The officers requested qualified immunity, but the judge stated that he could not determine their immunity without knowing the facts of the case. The defendant officers appealed.

ISSUE: Is an officer required to seek out exculpatory evidence when sufficient inculpatory evidence exists for an arrest?

HOLDING: No

DISCUSSION: The court discussed the standard for qualified immunity and determined that under Michigan law, the officers had probable cause to arrest Klein for domestic assault. Klein argued that since neither officer interviewed him, they did not do a complete investigation. However, the Court agreed that when an officer has sufficient inculpatory evidence to constitute probable cause, and do not know of any exculpatory evidence, that an arrest is appropriate.

The court reversed the lower court's denial of qualified immunity for both officers.

Claybrook v. Birchwell
274 F.3d 1098 (6th Cir. 2001)

FACTS: On February 28, 1995, Officers Birchwell, Lewis and Spencer, Caucasian undercover officers with Nashville P.D. were surveilling a high crime neighborhood. At approximately 9:11 p.m., they observed an African-American male (Royal Claybrook, Sr.) standing "near the street curb in the dimly-lit parking lot of the F & J Market, while displaying a long gun at port-arms." An automobile blocked the lot entrance. The officers knew that the market had been the target recently of crime, and they suspected that a robbery was in progress. Birchwell, pursuant to procedures, asked for the dispatch of a marked car and uniformed officers.

Birchwell then drove to a nearby drive to further observe the gunman. However, the maneuvering of the car attracted the attention of Claybrook, who "advanced menacingly" behind his automobile. The officers did not know that Claybrook's daughter-in-law, Quintana, worked at the market. She was responsible for depositing illegal betting proceeds, as the market served as a "front" for a "numbers" operation.

On the evening in question, Claybrook was serving as a security guard, to protect Quintana. When the officers approached, they did not realize that Quintana was already inside the vehicle sitting at the entrance.

The plainclothes officers ordered Claybrook to drop his weapon, and he responded that they should drop their weapons. At that point, gunfire erupted, and Quintana was shot. Crouching inside the car, Quintana did not witness the rest of the shootout; she was trying to call 911 and then her husband to report what she believed to be a robbery attempt.

Claybrook crouched behind his vehicle and the officers continued to fire. They testified that they tried to identify themselves as police, both verbally and by displaying their badges. Claybrook continued to shoot, and Birchwell was struck several times. While the officers were calling for assistance, Claybrook came around the building, apparently planning an ambush from the rear. As he found a "dominant strategic firing position," the officers fired, fatally wounding him.

[70] Michigan law "preferred" arrest for domestic violence.

This occurred over the course of less than two minutes, and immediately, other officers and EMS was on the scene. Claybrook was dead at the scene, and Quintana was rushed to the hospital, seriously wounded.

The officers requested summary judgment based on qualified immunity, and they were denied. They appealed.

ISSUE: When contested facts regarding deadly force span an entire incident, or may specific blocks of time be considered in isolation?

HOLDING: A consideration of a deadly force incident must encompass more than just the moment when the shots were fired.

DISCUSSION: While the officers agreed that there were disputed facts in the record, most importantly, as to who fired the first shot, the stated the court need only consider the reasonableness of their actions in the moment before the fatal shot was fired on Claybrook. However, the Court disagreed, stating that while some temporal segmentation of the incident was appropriate, that this incident was "not so easily divided."

The officers split the situation into two segments, their entry into the scene up through the first firefight, then Claybrook's attempted ambush. They asked the court to only consider the second segment, ignoring the fact that the officers precipitated the initial gunfight. Instead, the court split the situation into three parts, the initial approach and confrontation, the initial firefight and then the final ambush attempt.

The Claybrooks brought suit to "contest *all* [71]use of deadly force against [Royal Claybrook, Sr.], not only the shot that took his life," thus the court must consider both of the shooting situations. Both constituted a use of deadly force.

The court affirmed the judgment of the lower court denying summary judgment to the defendant officers.

U.S. v. Talley
275 F.3d 560 (6th Cir. 2001)

FACTS: On August 23, 1999, five Shelby County (Tennessee) Sheriff's department went to a residence in Memphis to arrest one Vidale Cothran. Two went to the front door, and two to the back. The fifth went to the apartment manager's office seeking information.

When the officers knocked, an individual looked out of the window. Officer Rush displayed his badge and asked the individual to come to the door. They heard a "loud commotion" and several individuals running throughout the apartment and up and down the stairs. Concerned, the officers put on vests. After knocking again, Rush turned off the electricity. Cothran opened the door and obeyed the officer's orders to lie on the ground. As he approached Cothran, Rush saw movement in the residence. Rush secured that individual, Talley, and asked if there was anyone else inside. Talley stated that his girlfriend was inside, and she too was located and secured.

Officer Rush, standing at the front doorway, spotted two heads "pop up" at the end of the hallway inside the apartment. He stepped inside and ordered the two persons to "come forward."

Inside the apartment, Rush saw bullets and a magazine inside a trash can, in plain view. He told other officers of the possibility of a firearm, and opened the back door to allow another officer there to enter.

[71] Emphasis in original

Rush asked Cothran and Talley about the gun. Talley replied it was in the vacuum cleaner, where it was later found. The officers did a protective sweep of the second floor. Rush also reconnected the electricity. The sweep revealed no other person, and at that time, no contraband.

Passing back through the house, Rush smelled something burning. He found a towel on one of the electric stove burners. Removing the towel, he saw several items of drug paraphernalia, including cocaine base.

Cothran consented to a search and drug dogs were brought in.

Talley moved to exclude his statement about the location of the gun. While stating that the statement appeared voluntarily given, the district court found it did violate Miranda because the question was in an accusatory form. The Court also found that the officers had no reason to do a protective sweep and suppressed the magazine and ammunition, and the statement.

ISSUE: May an officer interrogate a suspect about matters relating to safety?

HOLDING: Yes

DISCUSSION: The government argued that Talley was simply a guest in Cothran's apartment, and had no expectation of privacy. Because of that, Talley could not challenge Rush's entry into the apartment. The Court held that a "warrantless interrogation is permitted when officers have a reasonable belief based on articulable facts that they are in danger."[72]

The officers had sufficient justification for entering the residence, to sweep the premises. They had heard a "considerable amount of noise" and the residents did not open the door for nearly thirty minutes after the initial knock. The officers indicated their concern by putting on vests, and continued to wear their vests throughout the encounter. The surprise presence of two more individuals, when the officers had been told that there were no more people in the house and after Rush had called for everyone to come out.

The district court made a series of speculations about what Rush could have done instead of entering the house, but the appellate court determined that Rush had pursued a "reasonable course" of action.

The District Court's decision to suppress was overturned.

Risbridger v. Connelly[73]
275 F.3d 565 (2002)

FACTS: In the early morning hours of November 30, 1997, Officer Fadly was called to assist Officers Phillips and Blanck. They had stopped two males who were acting suspiciously, and had supposedly witnessed a fight in the alley. As the officers were speaking to them, Risbridger (the plaintiff) and his brother walked by, and one of the witnesses identified Risbridger as one of the participants in the fight.

Officer Fadly approached Risbridger and asked for identification. Risbridger refused, and asked the reason. Fadly explained that he had been picked out as a participant in a fight. Fadly again asked him for identification and told Risbridger that he could be arrested if he refused. Risbridger refused and was arrested for Disorderly Conduct.[74]

[72] New York v. Quarles, 467 U.S. 649 (1984)

[73] Multiple defendants

[74] Michigan law includes the following as an element of Disorderly Conduct: "assault,

The trial court found that the arrest was invalid because Risbridger was free to refuse to talk to the officers. Risbridger then sued under 42 U.S.C. §1983. Partial summary judgment was entered on behalf of both parties.

ISSUE: May an officer be held liable for enforcing a presumptively valid local law?

HOLDING: No

DISCUSSION: Risbridger's claim is based on the idea that he cannot be forced, by state or local law, to produce ID or otherwise identify himself upon the request of an officer. He bases his claim on Brown v. Texas[75], which states that "document stops" are not permitted, where the sole purpose of a stop is to check ID. In fact, the Brown Court specifically did not address the issue of identification during a valid Terry stop.

However, because the question of "whether a Fourth Amendment right to refuse to provide identification during a valid Terry stop renders invalid an arrest that is based on probable cause to believe the individual has violated a presumptively valid state or local law ...." has not been made sufficiently clear, the officers are entitled to qualified immunity. The Court in Michigan v. DeFillippo[76] stated that an officer should not be required "to anticipate that a court would later hold [the] ordinance unconstitutional."

obstruct, resist, hinder or oppose any member of the police force ...."

[75] 443 U.S. 47 (1979)

[76] 443 U.S. 31 (1979)

U.S. v. Matthews
278 F.3d 560 (6th Cir. 2002)

FACTS: On September 4, 1998, shortly after midnight, Officer Elston[77] was patrolling a private street in a public housing project. The project suffered from high crime, and the property was posted against trespassers.

Elston focused on Matthews because he was watching the police car. Elston called to Matthews to come to the car, at which point, Matthews quickly moved away. Elston called for him again, and got out of the car, running after Matthews. Elston ran into the apartment of Ms. Mayes, who was standing in her open doorway, and knocked her down (Mayes did not know Elston and did not invite him into the apartment.) Elston followed and tackled Matthews, and subsequently a handgun was found under a piece of furniture where the struggle occurred. Matthews, a felon, was charged with the illegal possession of the firearm. Matthews pled guilty, retaining his right to appeal, claiming that his flight was only in response to Elston's attempt to make an illegal Terry stop.

The district court found although Elston may not have had reasonable suspicion at the time he initially called to Matthews, that Matthews' subsequent criminal acts provided probable cause for the arrest and search.

ISSUE: Does a suspect committing crimes while running from the police allow an officer to make a probable cause arrest?

HOLDING: Yes

DISCUSSION: The Court touched upon whether Elston's actions even constituted a Terry stop and decided that they did not,

[77] Presumably of the Nashville (TN) Police Department, but undisclosed in the opinion.

since Elston never actually instructed Matthews to stop. The Court agreed with the lower court that once Matthews ran away, and committed crimes such as assault and unlawful entry, that the situation rose to the level of probable cause sufficient for Elston to make an arrest.

Heggen v. Lee
284 F.3d 675 (6th Cir. 2002)

FACTS: In 1998, Gary Lee defeated Sheriff Raymond Jones in the primary election for Hopkins County Sheriff, and ran unopposed in the general election. Plaintiff Danny Ray Heggen (and other plaintiffs, Todd Blakely and James Pendergraff) were all deputy sheriffs for Jones.

Heggen and the others actively supported Jones, with bumper stickers, signs and personal support.

When taking office in 1999, Lee did not rehire the three deputies or the office manager, Kathy Walters Knox.[78] Lee stated he did not rehire Heggen because of his after-hours activities at an adult nightclub and because of complaints about his handling of several cases. He stated that he did not rehire Blakely because he frequented the same club. He stated he did not rehire Pendergraff because he had promised that job to someone – Pendergraff worked primarily as a court bailiff. (However, the Plaintiffs put forth evidence that Heggen did not know about the club until some six months later, after the lawsuit was filed.)

ISSUE: May a Kentucky sheriff fire a deputy simply because of their political allegiance to another candidate?

HOLDING: No

[78] Knox was dismissed from the lawsuit and did not appeal.

DISCUSSION: Sheriff Lee claimed that the deputies were "confidential" or "policymaker" employees, an exception to the usual rule that limits patronage firings. He argues in the alternative that even if the Plaintiffs make a valid claim, that he is entitled to qualified immunity.

In Elrod v. Burns,[79] the Supreme Court stated that a "non-policymaking, nonconfidential government employee performing his or her position in a satisfactory manner cannot be dismissed solely on the grounds of political beliefs." The court must first determine if political affiliation is a consideration for the particular position. In Brangi v. Finkel,[80] the Court carved out categories that would qualify for such exceptions. Previously, in Hall v. Tollett,[81] the court had determined that the position of deputy sheriff was not subject to a valid patronage dismissal, as the usual job duties did not require a particular political affiliation.

Lee argued that Kentucky deputies have certain discretionary authorities that should permit them to be fired, and because in such a small office (10 deputies) that it was necessary that there be "mutual trust and confidence."

As to the first argument, the Court distinguished between discretionary authority and policymaking authority. The Court looked closely to other cases that involved the staff of an elected official, such as Sowards v. Loudon County, Tenn.,[82] in which a jailer who did not support the sheriff was fired. The sheriff argued that the employees' actions could have severe legal consequences for him, but the court did not

[79] 427 U.S. 347 (1976)
[80] 445 U.S. 507 (1980)
[81] 128 F.3d 418 (6th Cir. 1997)
[82] 203 F.3d 426 (6th Cir. 2000)

accept that the employee's day-to-day work did not involve policymaking sufficient to justify a firing.

The Court concluded that political loyalty was not necessary for Kentucky deputy sheriffs to effectively fulfill their job duties.

Having determined that the deputies should not have been fired, the Court then turned to whether Lee should have known his conduct to be a violation of their rights. However, because of the passage of time from when Hall, supra, was decided, and because the facts were quite similar, the Court found that Lee was not entitled to qualified immunity.

U.S. v. Pelayo-Landero
285 F.3d 491 (6th Cir. 2002)

FACTS: In 1998, the Tennessee Bureau of Investigation (TBI) were involved in a lengthy drug investigation with "Jessie," a Hispanic male. He disappeared before the agents could take action.

In December, 1999, TBI learned from an informant that Jessie was in the area, selling cocaine and marijuana. Shortly afterward, a TBI informant, working under TBI's direction and monitoring, approached Jessie and purchased marijuana, and was promised cocaine in the future from a mobile home in the area. He reported the presence of a firearm.

On January 6, 2000, Agent Hannon applied for a search warrant of the mobile home. They went to serve the warrant on January 11. They approached the trailer quietly, dressed in clothing that clearly identified them as officers. They could hear and see persons inside, through the open front door. The knocked on the door and announced, in English, that they had a warrant. After a few seconds, they entered through the unlocked screen door and ordered everyone to get down on the floor. Three men, two women and several children were present. The men were searched, and weapons were found on two of them. They also located drugs, counterfeit documents and more weapons in the trailer.

Subsequently, the TBI learned that two of the men were illegal aliens, and they were interviewed, in Spanish, by the INS, during which they admitted to illegal possession of the drugs and the weapons.

Landero, one of the men, requested suppression of the evidence.

ISSUE: May officers enter quickly after knocking if they reasonably believe there to be a safety risk?

HOLDING: Yes

DISCUSSION: The appellate court adopted the trial court's reasoning in denying the suppression motions

Landero argued first that the trailer address was incorrect on the warrant, which was apparently the case, but the court found that the mistake was logical given the positioning of the trailer and that the description was specific enough to satisfy the particularity requirement.

He also argued that the police did not wait a reasonable period of time after knocking before the entered the trailer. However, the officers stated that the circumstances did not allow them to wait, and that they were justifiably concerned about firearms, because of information they had received.

Phelps v. Coy
286 F.3d 295 (6th Cir. 2002)

FACTS: On August 30, 1997, Officers Coy and Stutes, Xenia (Ohio) police officers,

arrested Phelps for a municipal open container violation. He was handcuffed and taken to the station for booking. Stutes asked Phelps to remove his shoes and socks, so that he could be sure he had nothing hidden there. Stutes asked Phelps to lift his feet, but as he did so, apparently his foot got too close to Stutes' face and he grabbed the foot. Coy perceived the incident as Phelps trying to kick Stutes, and tackled him. They fell to the ground, and Coy struck Phelps twice in the face and banged his head on the floor several times. There is no indication that Phelps, who was still handcuffed, was a threat to Coy.

Coy requested and was denied summary judgment, and he appealed.

ISSUE: Does the Fourth or an Eighth Amendment standard apply to a prisoner still in the custody of the arresting officers?

HOLDING: Fourth

DISCUSSION: Coy argued a number of points. He stated that the Fourth Amendment standard did not apply, because Phelps had already been arrested – and as such, the Eighth Amendment standard would apply instead. However, the Court found that the Fourth Amendment continues to apply during such time as the arrested party is in the custody of the original arresting officers.

The Court held that Coy continued to assault Phelps after a reasonable officer would have realized that there was no longer any threat and that such unreasonableness was clearly established at the time the events occurred--. The Court upheld the denial of the summary judgment.

Ewolski v. City of Brunswick
287 F.3d 492 (6th Cir. 2002)

FACTS: On March 19, 1995, Beverly Lekan was bedridden with multiple sclerosis, and was receiving home health services from Tri-County Homes Nurses, Inc. Her husband, John Lekan, entered the room with a rifle, placing it near the aide's face. He displayed the rifle again a few days later. On March 27, the aide reported the incident to her supervisor, who called Ms. Lekan and told her that Tri-County wanted her husband to sign a contract regarding the guns. She asked if Lekan wanted to address the matter with him, and initially she agreed, but called back to say she wasn't comfortable doing so. The supervisor agreed to discuss the matter with John Lekan.

On March 31, Lekan called back and said she wanted to cancel the aide for that day and wanted Hillegrass (the supervisor) to help her consider a nursing home placement. She told Hillegrass that her husband was angry and had kept their son home from school that day. Hillegrass asked if there was a problem. Before Ms. Lekan could answer, Mr. Lekan got on an extension phone and cursed Hillegrass.

Later that day, Helen Ewolski (Beverly Lekan's mother) called and explained to Hillegrass that Lekan had post-traumatic stress syndrome, and that while he had been verbally abusive, he had never been physically abusive. Hillegrass called Dr. Kinkle's office, Ms. Lekan's doctor, expressing concern for Ms. Lekan and her son. She learned that Ms. Lekan had also called the doctor that morning. Hillegrass also called Adult Protective Services and Children's Services. She was later told that neither agency considered this an emergency, and that they would not be taking immediate action, but Medina County

Human Services did contact the Brunswick P.D. about the situation.

A little while later, Hillegrass heard from Sgt. Solar of the P.D. They discussed the matter, and he told her that they may have a stand-off, and that he was working on a plan.

Sgt. Solar met with other officers. They had collected information that Lekan was a paranoid schizophrenic, that he had not been taking his medication and there was a potential for violence. Lekan's sister-in-law, who worked for the police, stated that he had guns and she believed he would shoot at police.

Sgt. Solar decided to send officers to the location. Officers Schnell and Puzella volunteered to approach the house and other officers were to wait nearby, just in case. Both Schnell and Puzella were to wear civilian clothes.

When the officers arrived, they made contact with Lekan. He refused to open the door, speaking with them instead through a small, open window. They asked to speak to Ms. Lekan, but instead, Lekan started to sing the national anthem. Puzella displayed his credentials. Lekan withdrew into the house. Puzella kicked the door open, entered and was shot. Puzella and Schnell retreated, and eventually, Puzella was transported from the scene.

The officers contacted Chief Beyer (Brunswick P.D.) and explained the situation. Emergency Response Team (ERT) officers went to the scene to prepare for a tactical response. Sgt. Solar was to assume the role of chief negotiator.

In the meantime, Ms. Lekan had called the P.D. and reported that the door had been broken down and someone shot. She was transferred to Solar, who asked to call her back on another line. When he called back, Lekan answered, and told him the he was armed and ready. Solar asked him to give up but he refused. Solar returned to the scene and tried to negotiate further. Lekan became more incoherent as time passed, and eventually asked to speak to Sen. Kennedy.

Relatives of the Lekan's went to the station to offer assistance, but they were not allowed to speak to him.[83]

Chief Beyer asked Polzner, a psychologist, to give him an assessment. He had been monitoring, and he confirmed the risk was quite high. They discussed a tactical assault, and eventually, Beyer ordered one. The ERT broke in and entered, but one of the flash-bangs[84] started a fire. When one of the officers stopped to put it out, the officers were forced to retreat under gunfire, and two more were injured.

At about 3 a.m., Solar spoke to both Lekan and the son, J.T. J.T. said he was alright at that time. Lekan asked to speak to a cousin, who was a priest, but Solar refused unless Lekan left the house.[85]

An armored vehicle from Cleveland P.D. arrived, and was taken to the front lawn to illuminate the house. Officers tried to talk to Lekan with a loudspeaker, but got no response. Eventually, the armored vehicle was used to ram the wall and inject more tear gas. Between 4 and 5 a.m., shots were fired inside the house. Sometime after 11

[83] This is a common practice in hostage negotiation, since negotiators cannot be sure how the hostage-taker feels about the friend or family member.

[84] An explosive device used as a distracter during tactical operations.

[85] Solar and another negotiator believed the request to speak to a priest was a sign that he might be considering a murder-suicide ritual.

a.m., the vehicle was used to push through the garage door, and the police conducted a search. They found the bodies of John and J.T. Lekan, both having been shot. (Ms. Lekan was apparently uninjured in the standoff, but died before the case was resolved.)

Afterwards, several experts conducted a review of the situation, and issued several criticisms of the police tactical operations.

Family members filed suit on behalf of the estates of the Lekan family. The District Court awarded summary judgment to all officer-defendants. The Plaintiffs appealed.

ISSUE: May officers make a warrantless entry if circumstances indicate an emergency?

HOLDING: Yes

DISCUSSION: The Court divided the case into several sections. First, they addressed the issue of the warrantless entry of the house by Puzella and Schnell. The concluded the entry was quite justified by the erratic behavior displayed by Lekan and the information they had received prior to their arrival. The Plaintiffs argued that the officers created the exigent circumstances themselves by attempting to see Ms. Lekan, but the Court disagreed, as there was no evidence the officers were trying to circumvent the law to gain entry.

As to the excessive force, while the Lekan family members were not seized, neither was Mr. Lekan, at least, free to leave. Because of that, the Court considered it under the Fourth Amendment standard of reasonableness. The Court concluded "in light of [his] willingness to use deadly force against the police in resisting arrest, the use of nondeadly force ... was not excessive under any version of the facts before us."

Another issue was that of a violation of substantive due process towards Ms. Lekan and her son. Although they were not in the custody of the police, they argued that the officers' actions directly increased their vulnerability to danger. The Court looked to County of Sacramento v. Lewis[86] which enunciated the "shocks the conscience" standard. The Court acknowledged that the officers were obviously taking deliberate, rather than impetuous actions, and taking their time in making such critical decisions. The Court agreed that the police were essentially in a no-win situation, trying to effect a rescue under very difficult conditions. While the Court may have disagreed with many of the tactical decisions made during the stand-off, they did not consider the police action an unconstitutional abuse of power.

Sheets v. Mullins
287 F.3d 581 (6th Cir. 2002)

FACTS: Roger Montgomery and Theresa Sheets lived together with their infant, Tiffany and Sheets' son, Shawn, in Gallia County, Ohio. On February 20, 1997, Montgomery murdered Tiffany, set fire to the house, then committed suicide.

Sheets stated that the events occurred because of something that had happened several days earlier, on February 16. On that day, Montgomery had threatened her by putting a knife and then a gun to her. At that time, the children were with relatives. Sheets packed and left with her sister, Linda, who Montgomery had called to the scene. Sheets went to her nephew, Jerry Roach's, house; he immediately called the sheriff's office about the situation. Sheets wanted to pick up her daughter, but neither Linda nor Roach would take her there.

[86] 523 U.S. 833 (1998).

Deputy Sheriff Sgt. Mullins was dispatched to Roach's home to investigate. Mullins was a friend of Montgomery's. Sheets explained the situation. He told her that she would have to wait until Tuesday to file charges, because Monday was a holiday. He told her to wait to get Tiffany until that time.[87]

Mullins later admitted that he did not believe Sheets was telling the truth. Sheets stated that until that time, Montgomery had been a good father and had never threatened or hurt any of them.

Mullins attempted to locate Montgomery, unsuccessfully. He took no further action at all, and did not tell oncoming deputies about the threat. He did file an incident report that day, however.

On February 17, Sheets received a call from Montgomery, who was with Linda. She did not talk to him, apparently. On February 18, she filed a criminal complaint against Montgomery, and sought temporary custody of Tiffany. The court awarded her that custody.

On February 19, Sheets, with her lawyer, went to the sheriff's department with the custody order. They were told that the custody order alone wasn't enough, the sheriff's department needed a further order from the court directing the sheriff's department to assist in picking up the child. That same evening, Montgomery called Mullins and asked if a warrant had been issued, but Mullins did not know. He told Montgomery to check with the court the next morning about it.

On February 20, Montgomery appeared voluntarily on the domestic violence complaint. He was released, with a protective order issued on behalf of Sheets. The court did not order him to turn over Tiffany, finding that to be within the jurisdiction of the Juvenile Court. Later that day, the Juvenile Court issued an order to the Gallia County sheriff's department ordering them to assist Sheets with collecting Tiffany. Unfortunately, before that could be done, Montgomery killed Tiffany and himself.

Sheets filed suit against Mullins claiming that she and Tiffany were denied their constitutional rights to due process and equal protection. Mullins claimed qualified immunity, and was denied.

ISSUE: May an officer's dilatory actions in serving court process, several days removed from at unlawful act, be the proximate cause of that act?

HOLDING: No

DISCUSSION: The Court found that the Tiffany's murder was too removed from Mullins' supposedly unlawful acts. In fact, Tiffany remained alive for several days afterwards, after there had been substantial court action.

The Court found that qualified immunity was appropriate for Mullins, and remanded the case with that directive.

<u>Jones v. Union County, Tennessee</u>
296 F.3d 417 (6th Cir, 2002)

FACTS: Following their 1997 divorce, Sherry Jones obtained a protection order against her ex-husband, Meb Jones, for physical and mental abuse.[88] Sherry claimed her ex-husband had continually violated the order before the divorce was final, making unwanted visits to her home to see their two

[87] Tiffany was with her aunt, Montgomery's sister.

[88] Because they share the same last name, first names will be used.

teen-aged children. He did not threaten her during that time.

After the divorce was final, however, Sherry sought another order, alleging that he had beaten her badly and tapped her telephone. He was arrested, and another order was issued. Shortly afterward, Sherry claimed Meb took her at gunpoint and assaulted her, and again, she filed criminal charges. A few months later, she dismissed the order of protection because he promised not to hurt her again, and she felt she needed his help in dealing with their son's drug problem. There were no claims of abuse during that time.

However, in 1998, the ex-husband became involved in several fights with Sherry's male friends, telling them to leave "his house." He did not have a key to the house, in fact, but did have access to the garage, where he stored some belongings, including rifles. Sherry did not express concern at that time. Later, however, she did ask the sheriff's office to assist in removing him from the property, and did consider getting another order, but decided against it. A few months later, Meb was arrested for assaulting the male friends. During that same time frame, Sherry had begun dating Greg Leach. After being driven off the road while riding with Leach, Sherry sought another protection order.

Deputy Lawson tried to serve the protection order 3 times, and another deputy also tried to serve the order. They were going to Meb's given address, a houseboat, and didn't learn until later that he was not living there. However, Deputy Lawson did not go outside his county to serve orders, nor did he contact other counties. Neither did he go to Sherry's workplace, even though he admitted he knew where Meb worked. Finally, Lawson did not communicate to Sherry that he had not been able to serve Meb.

However, Sherry did state that she had told Meb about the order, several days afterward, Sherry stated that she told him that she had been told it had been served, although Sherry admitted she had not contacted the sheriff's office to confirm that. Both parties had been informed by mail that the scheduled hearing had been rescheduled for a short time later.

On October 13, the ex-husband broke into Sherry's house, shot her, struggled with Leach, who was sleeping there, and shot Sherry several times more. He then left and committed suicide.

Plaintiff sued the county and the sheriff's office, claiming that they failed to provide her adequate protection under due process and equal protection. Defendants were granted summary judgment.

ISSUE: Does a protective order create a "special relationship" between a victim and a law enforcement agency?

HOLDING: No

DISCUSSION: The court first addressed Sherry's claim that she was denied access to the court system by the sheriff's office failure to serve the order quickly. However, the court pointed out that the delay did not prejudice her claim at all.

Next, Sherry claimed discrimination, and would have had to prove that it was the "policy or custom of Union County to provide less protection to victims of domestic violence than ... other crimes, and that gender discrimination was the motivation for this disparate treatment." However, she did not point to any policy or other information that indicated that was the case. Instead, Sheriff Loy stated that their written policy indicated that domestic violence "was to be treated" as a dangerous situation.

Next, Sherry claimed she was in a "special relationship" with the sheriff's office as a result of the protection order. however, the court did not agree, and stated that under Tennessee law, the "sheriff's duty to execute arrest warrants was a public duty not owed to any particular person ...." She also claimed that the state created the danger by failing to serve the order in a timely manner, but the court stated that the sheriff's office did not create or increase the danger.

The lower court's order of summary judgment in favor of the defendants was upheld.

U.S. v. Martin
289 F.3d 392 (6th Cir. 2002)

FACTS: On January 18, 1999, in the evening, Officers Maurer and Jones of the Covington P.D. observed a woman, Virginia Wagoner, enter Timothy Martin's car. They saw Wagoner initially outside the car, near a parking lot, carrying only a cigarette. The fact she did not have a purse led the officers to believe she was a prostitute, as prostitutes did not typically carry purses. They believed she had been arrested on prostitution charges before. She was not wearing a coat, and it was cool, but not overly cold for a winter evening. The area was known for prostitution.

Wagoner signaled Martin in a way the officers recognized was common to prostitution. When Martin and Wagoner drove off, the officers called on Officer Neal, in a marked car, to stop the car.

After Neal stopped the car, Maurer removed Wagoner from the car and questioned her. She knew only Martin's first name, and that she had met him a year before. Martin, however, claimed to have known Wagoner for only a couple of months, and that he had met her while walking. He did not know her name.

Wagoner gave consent to search her person, and Maurer found a condom in her pocket. She was charged with loitering for prostitution purposes. Officer Cook, who was also at the scene, searched the car incident to Wagoner's arrest and found a handgun. Because of their observation, they believed the gun belonged to Martin and charged him with carrying concealed, and when it was learned he was a felon, they also placed federal charges.

Martin argued that the officers did not have reasonable suspicion to stop the car, that the interrogation did not create probable cause to arrest Wagoner and the search of the car was not made under any valid exception. The District Court conducted a suppression hearing and granted Martin's motion to suppress. The prosecution appealed.

ISSUE: May an arrest made subsequent to a Terry stop lead to a search incident to arrest, when the arrested person was only in the vehicle a few minutes and under the officer's observation the entire time?

HOLDING: Yes

DISCUSSION: Looking at the initial stop, the court asked first whether "there was a proper basis to stop the individual based upon the officer's 'aware[ness] of specific and articulable facts which gave rise to a reasonable suspicion.'"[89] Next, the Court must decide "whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances.[90]

[89] Quoting U.S. v. Garza, 10 F.3d 1241 (6th Cir. 1993)
[90] Id.

The Court looked to the recent case of U.S. v. Arvizu, [91] and confirmed "courts must not view factors upon which police officers rely to create reasonable suspicion in isolation." Instead, they stressed that the court must consider all of the officer's observations and the totality of the circumstances. The officers had articulated sufficient reason to make the initial stop.

With regards to the search of the car, the Court held that since the arrest of Wagoner was appropriate and based upon probable cause, that it was lawful to search the car in which she was riding at the time of the arrest.

[91] 534 U.S. 266 (2002).

Kentucky Statutes

Changes from the 2002 Legislature

(Statute headings and changes in boldface type; substantive deletions are indicated by boldface type and strike-throughs. Non-substantive deletions are indicated solely by strike-throughs)

KRS 186.010 Definitions for KRS 186.010 to 186.640

(Abridged)

(12) "Resident**" means any person who has** established Kentucky as his or her state of domicile. Proof of residency shall include, but not be limited to, a deed or property tax bill, utility agreement or utility bill, or rental housing agreement ~~**taken up a place of abode within this state; or any person who has had his actual or habitual place of abode in this state for the larger portion of the twelve (12) months next preceding the date on which his motor vehicle is registered or required to be registered in Kentucky; or any person maintaining a place of abode in this state for gainful employment; provided, however, that the Transportation Cabinet may promulgate administrative regulations exempting any person temporarily maintaining a place of abode in Kentucky, including a full-time student at Kentucky colleges and universities, from any requirement imposed by this chapter upon residents as defined in this chapter**~~**]. The possession by an operator of a vehicle of a valid Kentucky operator's license shall be prima-facie evidence that the operator is a resident of Kentucky.**

(13) "Special status individual" means:

(a) "Asylee" means any person lawfully present in the United States who possesses an I-94 card issued by the United States Department of Justice, Immigration and Naturalization Service, on which it states "asylum status granted indefinitely pursuant to Section 208 of the Immigration & Nationality Act";

(b) "K-1 status" means the status of any person lawfully present in the United States who has been granted permission by the United States Department of Justice, Immigration and Naturalization Service to enter the United States for the purpose of marrying a United States citizen within ninety (90) days from the date of that entry;

(c) "Refugee" means any person lawfully present in the United States who possesses an I-94 card issued by the United States Department of Justice, Immigration and Naturalization Service, on which it states "admitted as a refugee pursuant to Section 207 of the Immigration & Nationality Act"; and

(d) "Paroled in the Public Interest" means any person lawfully present in the United States who possesses an I-94 card issued by the United States Department of Justice, Immigration and Naturalization Service, on which it states "paroled pursuant to Section 212 of the Immigration & Nationality Act for an indefinite period of time."

KRS 186.410 Operators' licenses – Requirements and issuance – Non-driver identification cards, validity – Driver training programs

(1) Every person except those exempted by KRS 186.420 and 186.430 shall before operating a motor vehicle, motorcycle, or moped upon a highway secure an operator's license as provided in this chapter.

(2) **Except as provided in KRS 186.412**, all original, renewal, and duplicate licenses for the operation of motor vehicles, motorcycles, or mopeds shall be issued by the circuit clerk in the **county of the applicant's residence** ~~**Transportation Cabinet**~~**.** Applications for renewal licenses shall be made every four (4) years within ~~**thirty (30) days after**~~ the birth month ~~**date**~~ of the applicant. A license shall not be issued until the application has been certified by the cabinet **and the applicant has, if required under KRS 186.6401, successfully completed the examinations required under KRS 186.480t.**

(3) All color photo nondriver identification cards shall be **issued under the provisions of KRS 186.412** ~~**valid for four (4) years from the date of issuance]**~~**.**

(4) A person may, at any time between the age of sixteen (16) and **before the person's eighteenth birthday** ~~**[eighteen (18)]**~~**,** enroll in one (1) of the following driver training programs:

(a) ~~**[The person may enroll in]**~~A driver's education course administered by a school district;~~**[or]**~~

(b) ~~[The person may enroll in]~~A driver training school licensed pursuant to KRS Chapter 332 which offers a course meeting or exceeding the minimum standards established by the Transportation Cabinet; or

(c) State traffic school. The person may seek to enroll in state traffic school before the person's eighteenth birthday. Persons enrolling in state traffic school pursuant to this paragraph shall not be required to pay a fee.

(5) If, for any reason, a person fails to successfully complete the required driver training pursuant to subsection (4) of this section within one (1) year of being issued an operator's license, the Transportation Cabinet shall enroll the person in state traffic school and cancel or suspend the operator's driving privileges until the person completes state traffic school.

KRS 186.412 Application – License- Temporary license – Nondriver's identification card = Renewal of license by mail by citizens in military serving out-of-state – Limited exemptions for citizens with expired licenses who are returning from military – Medical insignia – Limitation on number of licenses – Married woman's name

(1) A person under the age of twenty-one (21) at the time of application for an instruction permit may apply for an operator's license to operate a motor vehicle, motorcycle, or moped if the person has possessed the valid instruction permit for at least one hundred eighty (180) days. A person who is at least twenty-one (21) years of age at the time of application for an instruction permit may apply for an operator's license to operate a motor vehicle, motorcycle, or moped if the person has possessed the valid instruction permit for at least thirty (30) days.

(2) Except as provided in subsection (4) of this section, a ~~The~~ person shall apply for an operator's license in the office of the circuit clerk of the county where the **person~~[he]~~** lives. The application form shall require the **person's:~~[applicant's]~~**

(a) Full legal name and signature;~~[,]~~

(b) Date of birth**;**~~[,]~~

(c) Social Security number**, federal tax identification number, a letter from the Social Security Administration declining to issue a Social Security number, or a notarized affidavit from the applicant to the Transportation Cabinet swearing that the person either does not have a Social Security number, or refuses to divulge his or her Social Security number, based upon religious convictions;**~~[,]~~

(d) Sex**;**~~[,]~~

(e) Present **Kentucky** resident address**, exclusive of a post office box address alone;**~~[,]~~

(f) Other information necessary to permit the application **of United States citizens** to also serve as an application for voter registration**;**~~[, and]~~

(g) A brief physical description of the applicant**;**

(h) A statement if the person has previously been licensed as an operator in another state;

(i) Proof of the person's Kentucky residency including, but not limited to, a deed or property tax bill, utility agreement or utility bill, or rental housing agreement; and

(j) Other information the cabinet may require by administrative regulation promulgated under KRS Chapter 13A.

(3) A permanent resident shall present one (1) of the following documents issued by the United States Department of Justice, Immigration and Naturalization Service:

(a) An I-551 card with a photograph of the applicant; or

(b) A form with the photograph of the applicant or a passport with a photograph of the applicant on which the United States Department of Justice, Immigration and Naturalization Service has stamped the following: "Processed for I-551. Temporary evidence of lawful admission for permanent residence. Valid until -----. Employment authorized."

(4) If the person is not a United States citizen and has not been granted status as a permanent resident of the United States, the person's application for an original operator's license shall be submitted to either the Transportation Cabinet in Frankfort or a Transportation Cabinet field office.

(a) The application form shall be accompanied by the person's documentation issued by the United States Department of Justice, Immigration and Naturalization Service, authorizing the person to be in the United States and, if applicable, the person's international driving permit. The application form of a special status individual with a K-1 status shall be

accompanied by an original or certified copy of the person's completed marriage license signed by the official who presided over the marriage ceremony and two (2) witnesses. The application form of a special status individual with a K-1 status shall also include the person's petition to enter the United States for the purpose of marriage that contains the name of the prospective spouse. If the name of the prospective spouse on the petition does not match the name of the spouse on the marriage license, the Transportation Cabinet shall not be required to issue an operator's license.

(b) The Transportation Cabinet shall, within fifteen (15) days of receipt of the application, review the person's documentation and determine if the person will be issued a Kentucky operator's license. If the review of an application will take longer than fifteen (15) days, the cabinet shall continue the review, but the cabinet shall be required to make a determination in all cases within thirty (30) days of receipt of the application.

(c) If the cabinet determines the person may be issued an operator's license, the cabinet shall issue the person an official form that the person shall take to the office of the circuit clerk of the county where the person resides. The circuit clerk shall review the person's documentation and the official form issued by the Transportation Cabinet. If the documentation is verified as accurate, and if the person successfully completes the examinations required under KRS 186.480, the circuit clerk shall issue the person a Kentucky operator's license.

(d) Except as provided in paragraphs (e) and (f) of this subsection, a person who is not a United States citizen and who has not been granted status as a permanent resident of the United States shall apply to renew an operator's license, or obtain a duplicate operator's license, in the office of the circuit clerk in the county in which the person resides.

(e) If a person is renewing an operator's license or is applying for a duplicate license after July 15,2002, and the person's documentation issued by the United States Department of Justice, Immigration and Naturalization Service, has not been reviewed by the either the Transportation Cabinet in Frankfort or a Transportation Cabinet field office under the provisions of this subsection, the person shall be required to apply for the renewal or duplicate with either the Transportation Cabinet in Frankfort or a Transportation Cabinet field office.

(f) If a person has any type of change in the person's immigration status, the person shall apply to renew an operator's license with either the Transportation Cabinet in Frankfort or a Transportation Cabinet field office~~[If the person is not a United States citizen, the application form shall be accompanied by a photographic copy of the person's employment authorization card, visa card to enter the United States, or permanent residency card issued by the United States Department of Immigration Services and, if applicable, a photographic copy of the person's international driving permit. All applications shall state:~~

~~(a) If the applicant has previously been licensed as an operator and by what nation or state; and~~

~~(b) Other information the cabinet may require by administrative regulation promulgated pursuant to KRS Chapter 13A~~].

(5)~~[(2)]~~ **The** circuit clerk~~[Transportation Cabinet]~~ **shall issue** an~~[a plastic laminated]~~ **operator's license bearing a color photograph of the applicant** and other information the cabinet may deem appropriate**. The photograph shall be taken by the circuit clerk so that one (1) exposure will photograph the applicant and the application simultaneously~~[, using the process determined under provisions of KRS 186.413]~~. When taking the photograph, the applicant shall be prohibited from wearing sunglasses or any other attire that obscures any features of the applicant's face as determined by the clerk. The clerk shall require an applicant to remove sunglasses or other obscuring attire before taking the photograph required by this subsection. Any person who refuses to remove sunglasses or other attire prohibited by this section as directed by the clerk shall be prohibited from receiving an operator's license. The~~[plastic laminated]~~ operator's license issued by the cabinet shall not contain the applicant's**

Social Security number. The cabinet shall promulgate administrative regulations pursuant to KRS Chapter 13A that develop a numbering system that uses an identification system other than Social Security numbers. If an applicant does not have a Social Security number, or the applicant has submitted a notarized affidavit refusing to divulge his or her Social Security number based upon religious convictions, the Transportation Cabinet shall assign the applicant a unique identifying number. **The license shall also designate by color coding and use the phrase "under 21" if the licensee is under the age of twenty-one (21); "CDL" if the license is issued pursuant to KRS Chapter 281A; or "under 21 CDL" if the licensee holds a commercial driver's license issued pursuant to KRS Chapter 281A and is under the age of twenty-one (21).**

(6)~~[(3)]~~ **Every applicant shall make oath to the circuit clerk as to the truthfulness of the statements contained in the form.**

(7) (a) Except as provided in subsection (8) of this section,~~[(4) The clerk may, after determining that the applicant has fully complied with the law governing applications, issue a temporary operator's license to be valid for not more than ninety (90) days. The temporary license shall be valid in lieu of the permanent license during the certification period and shall be destroyed upon receipt of the permanent operator's license.~~

~~(5)]~~ the circuit clerk shall issue a color photo nondriver's identification card to any person who **is a Kentucky resident and who** resides in the county who **complies with the provisions of this section and who** applies in person in the office of the circuit clerk.~~[A nondriver's identification card shall be subject to the provisions of this section.]~~ An application for a nondriver's identification card shall be accompanied by **the same information as is required for an operator's license under subsection (2) of this section, except if a person does not have a fixed, permanent address, the person may use as proof of residency a signed letter from a homeless shelter, health care facility, or social service agency currently providing the person treatment or services and attesting that the person is a resident of Kentucky** ~~[a signed Social Security card and a birth certificate, or other proof of the applicant's date of birth provided under subsection (1) of this section. If the person is not a United States citizen, an application for a nondriver's identification card shall be accompanied by a photographic copy of the person's employment authorization card, visa card to enter the United States, or permanent residency card issued by the United States Department of Immigration Services]~~.

(b) It shall be permissible for the application form for a nondriver's identification card to include as a person's most current resident address ~~[The application shall require the applicant to provide his or her full legal name and most current resident address that may include, but is not limited to,]~~ a mailing address, post office box, or an address provided on a voter registration card. ~~[If an applicant for a nondriver's identification card is under the age of twenty-one (21), the applicant's most current resident address shall be required unless a current resident address is not available, in which case a mailing address, post office box, or an address provided on a voter registration card may be used.]~~

(c) Every applicant for a nondriver's identification card shall make an oath to the circuit clerk as to the truthfulness of the statements contained on the application form. If the applicant is not the legal **owner or** possessor of the address provided on the application form, the applicant shall swear that he **or she** has permission from the legal **owner, authorized agent for the legal owner or** possessor to use the address for purposes of obtaining the nondriver's identification card. The nondriver's identification card shall designate by color coding and by use of the phrase "under 21" if the applicant is under the age of twenty-one (21).

(d) A nondriver's identification card shall be valid for a period of four (4) years from the date of issuance. Except as provided in this subsection, an initial or renewal nondriver's identification card issued to a person who is not a United States citizen and who has not been granted status as a permanent resident of the United States and who is not a special status individual, but who is a Kentucky resident, shall be valid for a period equal

to the length of time the person's documentation from the United States Department of Justice, Immigration and Naturalization Service is issued, or four (4) years, whichever time period is shorter. An initial or renewal nondriver's identification card shall be valid for a period of two (2) years if the person is not a special status individual and the person's documentation issued by the United States Department of Justice, Immigration and Naturalization Service, is issued for an indefinite period of time and does not have an expiration date. The fee shall be the same as for a regular nondriver's identification card.

(e) A nondriver's identification card may be suspended or revoked if the person who was issued the card presents false or misleading information to the cabinet when applying for the card.

(8) A person shall not be eligible to be issued a nondriver's identification card if the person currently holds a valid Kentucky instruction permit or operator's license. If a person's instruction permit or operator's license has been suspended or revoked, the person may be issued a temporary nondriver's identification card. A temporary nondriver's identification shall be renewed annually and shall be surrendered when the person applies to have his or her instruction permit or operator's license reinstated.

(9)~~[(6) Licensed drivers temporarily out-of-county may be issued a license without a photograph. The license shall show in the space provided for the photograph the legend "valid without photo and signature."~~

~~(7)]~~ **If a citizen of the Commonwealth currently serving in the United States military is stationed or assigned to a base or other location outside the boundaries of the Commonwealth, the citizen may renew a Class D operator's license issued under this section by mail. If the citizen was issued an "under 21" operator's license, upon the date of his or her twenty-first birthday, the "under 21" operator's license may be renewed for an operator's license that no longer contains the outdated reference to being "under 21".**

(10)~~[(8)]~~ **A citizen of the Commonwealth renewing an operator's license by mail under subsection** (9)~~[(7)]~~ **of this section may have a personal designee apply to the circuit clerk on behalf of the citizen to renew the citizen's operator's license. An operator's license being renewed by mail under subsection** (9)~~[(7)]~~ **of this section shall be issued a license without a photograph. The license shall show in the space provided for the photograph the legend "valid without photo and signature".**

(11)~~[(9)]~~ **If a citizen of the Commonwealth has been serving in the United States military and has allowed his operator's license to expire, he shall, within ninety (90) days of returning to the Commonwealth, be permitted to renew his license without having to take a written test or road test. A citizen who does not renew his license within ninety (90) days of returning to the Commonwealth shall be required to comply with the provisions of this chapter governing renewal of a license that has expired. If a citizen of the Commonwealth has been issued an "under 21" or "under 21 CDL" operator's license and the person is unable to renew the license on the date of his twenty-first birthday, the "under 21" or "under 21 CDL" operator's license shall be valid for ninety (90) days beyond the date of the person's twenty-first birthday.**

(12)~~[(10)]~~ **The cabinet shall provide on each license to operate motor vehicles, motorcycles, and mopeds a space for the licensed driver's:**

(a) Blood type;

(b) Medical insignia if the person provides evidence that a medical identification bracelet noting specific physical ailments or a drug allergy is being worn or other proof as may be required by the cabinet; and

(c) A statement whereby the owner of the license may certify in the presence of two (2) witnesses his willingness to make an anatomical gift under KRS 311.195.

(13)~~[(11)]~~ **If the motor vehicle operator denotes a physical ailment or drug allergy on the operator's license, he may apply for and shall receive, for a fee of one dollar ($1) paid to the circuit clerk, a medical insignia decal that may be affixed to the lower left side of the front windshield of a motor vehicle.**

(14)~~[(12)]~~ **An operator's license pursuant to this section shall be designated a Class D license.**

(15)~~[(13)]~~ **A person shall not have more than one (1) license.**

(16)~~[(14)]~~ **Upon marriage, a woman applying for an operator's license or a color photo nondriver's identification card shall provide the circuit clerk with her marriage license and complete an affidavit form provided by the circuit court clerk. She shall have the following choices in regard to her full legal name as required in subsections** (2)~~[(1)]~~ **and**

(7)~~[(5)]~~ **of this section:**

(a) Use her husband's last name;

(b) Retain her maiden name;

(c) Use her maiden name hyphenated with her husband's last name;

(d) Use her maiden name as a middle name and her husband's last name as her last name; or

(e) In the case of a previous marriage, retain that husband's last name.

KRS 186.413 Commission to determine color photo process to be used. [Repealed – HB 188]

KRS 186.430 Exemption of Nonresidents [Amended by HB 188]

(1) Except as provided in subsection (2) of this section, a person over the age of sixteen (16) who is a United States citizen and who is not a resident of Kentucky may drive in Kentucky for a period of time not to exceed one (1) year from the date the person enters Kentucky if:

(a) The person possesses a valid license issued by the person's home state;

(b) The person has the license in his or her immediate possession at all times when operating a vehicle on the highways; and

(c) The person's home state ~~[A nonresident over the age of sixteen (16) who has been licensed as an operator in his home state or country and who has a valid operator's license certificate in his immediate possession may drive a motor vehicle, motorcycle, or moped upon Kentucky highways without a Kentucky instruction permit or operator's license, if his own state or country]~~ accords similar privileges to licensed residents of Kentucky.

(2) A person who is a United States citizen but who is not a resident of Kentucky who is enrolled as a full-time or part-time student at a university, college, or technical college located in Kentucky may drive in Kentucky on a valid license issued by the person's state of domicile, and shall not be required to obtain a Kentucky operator's license under this chapter if the person has a student identification card from a university, college, or technical college located in Kentucky in his or her immediate possession at all times when driving in Kentucky.

(3) A person over the age of sixteen (16) who is not a United States citizen and who is legally visiting this country for less than one (1) year may drive in Kentucky on a valid domestic license issued by the person's country of domicile and shall not be required to obtain a Kentucky driver's license ~~[A nonresident over the age of sixteen (16) whose home state or country does not require the licensing of operators and who has registered his own motor vehicle, motorcycle, or moped for the current calendar year in his home state or country, may operate that motor vehicle, motorcycle, or moped upon Kentucky highways for not longer than thirty (30) days in any one (1) year without obtaining a Kentucky instruction permit or operator's license. The person may be required at any time or place to prove lawful ownership and the right to operate the motor vehicle, motorcycle, or moped and to establish his identity]~~**.**

(4)~~[(3)]~~ A person over the age of sixteen (16) who is not a United States citizen, who has not been granted status as a permanent resident of the United States, but is a resident of Kentucky, shall be issued a Kentucky operator's license if the person complies with the requirements of KRS 186.412. Except as provided in this subsection, an operator's license issued to a person who is not a United States citizen, who has not been granted status as a permanent resident of the United States, and who is not a special status individual but is a Kentucky resident, shall be valid for a period equal to the length of time the person's documentation from the United States Department of Justice, Immigration and Naturalization Service is issued, or four (4) years, whichever time period is shorter. An initial or renewal operator's license shall be valid for a period of two (2) years if the person is not a special status individual and the person's documentation issued by the United States Department of Justice, Immigration and Naturalization Service, is issued for an indefinite period of time and does not have an expiration date. The fee shall be the same as for a regular operator's license. **The cabinet may at any time refuse or discontinue the exemptions authorized in this section for any grounds and may deny, cancel, suspend, or revoke an instruction permit or operator's license issued under this chapter.**

(5)~~[(4)]~~ **A person whose operator's license or privilege to operate a motor vehicle, motorcycle, or moped in this state has been denied, withdrawn, canceled, suspended, or revoked as provided in KRS 186.400 to 186.640 shall not operate a motor vehicle, motorcycle, or moped in this state under a license, permit, or registration certificate**

issued by any other jurisdiction during the period of denial, withdrawal, cancellation, suspension, or revocation.

KRS 186.435 Licensed driver who becomes Kentucky resident to apply for Kentucky operator's license within 30 days {New Section – HB 188]

(1) A licensed driver who becomes a Kentucky resident shall, within thirty (30) days of establishing residency, apply for a Kentucky operator's license in the office of the circuit clerk in the county where the person has established his or her domicile.
(2) The circuit clerk shall, before issuing a person a Kentucky operator's license, verify through the National Drivers Register that the person applying for a Kentucky operator's license does not currently have his or her operator's license or driving privilege suspended or revoked in another licensing jurisdiction.
(3) A person who is not a United States citizen but who has been granted permanent resident status by the United States Department of Justice, Immigration and Naturalization Service, and who is a Kentucky resident, shall follow the same procedures for applying for an original, renewal, transfer, or duplicate operator's license as persons who are United States citizens.

KRS 186.440 Persons ineligible for operator's license – Reinstatement fee and exemption [Amended by HB 188]

An operator's license shall not be granted to:
(1) Any person who is not a resident of Kentucky;
(2) **Any person under the age of sixteen (16);**
(3)**~~[(2)]~~ Any person under the age of eighteen (18) who holds a valid Kentucky instruction permit issued pursuant to KRS 186.450, but who has not graduated from high school or who is not enrolled and successfully participating in school or who is not being schooled at home, except those persons who satisfy the District Court of appropriate venue pursuant to KRS 159.051(3) that revocation of their license would create an undue hardship. Persons under the age of eighteen (18) shall present proof of complying with the requirements of KRS 159.051;**
(4)**~~[(3)]~~ Any person whose operator's license has been suspended, during the period of suspension;**
(5)**~~[(4)]~~ Any person whose operator's license has been revoked, nor to any nonresident whose privilege of exemption under KRS 186.430 has been refused or discontinued, until the expiration of the period for which the license was revoked, or for which the privilege was refused or discontinued;**
(6)**~~[(5)]~~ Any applicant adjudged incompetent by judicial decree;**
(7)**~~[(6)]~~ Any person who in the opinion of the State Police, after examination, is unable to exercise reasonable and ordinary control over a motor vehicle upon the highways;**
(8)**~~[(7)]~~ Any person who is unable to understand highway warnings or direction signs in the English language;**
(9)**~~[(8)]~~ Any person required by KRS 186.480 to take an examination who has not successfully passed the examination;**
(10)**~~[(9)]~~ Any person required by KRS Chapter 187 to deposit proof of financial responsibility, who has not deposited that proof;**
(11)**~~[(10)]~~ Any person who has not filed a correct and complete application attested to in the presence of a person authorized to administer oaths;**
(12)**~~[(11)]~~ Any person who cannot meet the requirements set forth in KRS 186.411(1) or (3); or**
(13)**~~[(12)]~~ Any person whose operator's license has been suspended or revoked under the provisions of KRS Chapter 186, 187, or 189A until the person has forwarded to the cabinet a reinstatement fee of fifteen dollars ($15). The fee shall be paid by certified check or money order payable to the State Treasurer who shall deposit five dollars ($5) of the fee in a trust and agency fund to be used in defraying the costs and expenses of administering a driver improvement program for problem drivers. Ten dollars ($10) of the fee shall be deposited by the State Treasurer in a trust and agency account to the credit of the Administrative Office of the Courts and shall be used to assist circuit clerks in hiring additional employees, providing salary adjustments for employees, providing training for employees, and purchasing additional equipment used in administering the issuance of driver's licenses. The provisions of this subsection shall not apply to any person whose license was suspended for failure to meet the conditions set out in KRS 186.411 when, within one (1) year of suspension, the driving privileges of the**

individuals are reinstated or to any student who has had his license revoked pursuant to KRS 159.051.

KRS 186.480 Examination of applicants by State Police – Exemptions [Amended by HB 188]

(1) The State Police shall ~~**[may]**~~ **examine every** ~~**[unlicensed]**~~ **applicant for an operator's license** as identified in KRS 186.6401, **except as otherwise provided in this section. The examination shall be held in the county where the applicant resides unless:**

(a) The applicant is granted written permission by the circuit clerk of the county in which he resides to take the examination in another county, and the State Police agree to arrange for the examination in the other county; or

(b) The applicant is tested using a bioptic telescopic device.

(2) The examination shall include a test of the applicant's eyesight to ensure compliance with the visual acuity standards set forth in KRS 186.577. The examination shall also include a test of the applicant's ability to read and understand highway signs regulating, warning and directing traffic, the applicant's knowledge of traffic laws and an actual demonstration of the applicant's ability to exercise ordinary and reasonable control in the operation of a motor vehicle. An applicant for a motorcycle operator's license shall be required to show his ability to operate a motorcycle, in addition to other requirements of this section. The provisions of this subsection shall not apply to an applicant who:

(a) At the time of application, holds a valid operator's license from another state, provided that state affords a reciprocal exemption to a Kentucky resident; or

(b) Is a citizen of the Commonwealth who has been serving in the United States military and has allowed his operator's license to expire.

(3) Any person whose operator's license is denied, suspended, or revoked for cause shall apply for reinstatement at the termination of the period for which the license was denied, suspended, or revoked by submitting to the examination. The provisions of this subsection shall not apply to any person whose license was suspended for failure to meet the conditions described in KRS 186.411 when, within one (1) year of suspension, the driving privileges of such individuals are reinstated.

KRS 186.570 Denial or suspension of license – Informal hearing- Appeal – Surrender of certificate – Medical review board- Prohibition against raising insurance on basis of denial or suspension for child support arrearage [Amended by HB 188]

(1) The cabinet or its agent designated in writing for that purpose may deny any person an operator's license or may suspend the operator's license of any person, or, in the case of a nonresident, withdraw the privilege of operating a motor vehicle in this state, subject to a hearing and with or without receiving a record of conviction of that person of a crime, if the cabinet has reason to believe that:

(a) That person has committed any offenses for the conviction of which mandatory revocation of a license is provided by KRS 186.560.

(b) That person has, by reckless or unlawful operation of a motor vehicle, caused, or contributed to an accident resulting in death or injury or serious property damage.

(c) That person has a mental or physical disability that makes it unsafe for him to drive upon the highways. The Transportation Cabinet shall, by administrative regulations promulgated pursuant to KRS Chapter 13A, establish a medical review board to provide technical assistance in the review of the driving ability of these persons. The board shall consist of licensed medical and rehabilitation specialists.

(d) That person is a habitually reckless or negligent driver of a motor vehicle or has committed a serious violation of the motor vehicle laws.

(e) That person has been issued a license without making proper application for it, as provided in KRS 186.412 and administrative regulations promulgated pursuant to KRS Chapter 13A.

(f) **That person has presented false or misleading information as to the person's residency, citizenship, religious**

convictions, or immigration status.

(g) A person required by KRS 186.480 to take an examination has been issued a license without first having passed the examination.

(h)~~[(g)]~~ That person has been convicted of assault and battery resulting from the operation of a motor vehicle.

(i)~~[(h)]~~ That person has failed to appear pursuant to a citation or summons issued by a law enforcement officer of this Commonwealth or any other jurisdiction.

(j)~~[(i)]~~ That person has failed to appear pursuant to an order by the court to produce proof of security required by KRS 304.39-010 and a receipt showing that a premium for a minimum policy period of six (6) months has been paid.

(2) The cabinet shall deny any person a license or shall suspend the license of an operator of a motor vehicle upon receiving written notification from the Cabinet for Families and Children that the person has a child support arrearage which equals or exceeds the cumulative amount which would be owed after one (1) year of nonpayment or failure, after receiving appropriate notice, to comply with a subpoena or warrant relating to paternity or child support proceedings, as provided by 42 U.S.C. secs. 651 et seq.; except that any child support arrearage which exists prior to January 1, 1994, shall not be included in the calculation to determine whether the license of an operator of a motor vehicle shall be denied or suspended. The denial or suspension shall continue until the arrearage has been eliminated, payments on the child support arrearage are being made in accordance with a court or administrative order, or the person complies with the subpoena or warrant relating to paternity or child support. Before the license may be reinstated, proof of elimination of the child support arrearage or proof of compliance with the subpoena or warrant relating to paternity or child support proceedings as provided by 42 U.S.C. sec. 666(a)(16) from the court where the action is pending or the Cabinet for Families and Children shall be received by the Transportation Cabinet as prescribed by administrative regulations promulgated by the Cabinet for Families and Children and the Transportation Cabinet.

(3) The cabinet or its agent designated in writing for that purpose shall deny any person an operator's license or shall suspend the operator's license of any person, or, in the case of a nonresident, withdraw the privilege of operating a motor vehicle in this state, where the person has been declared ineligible to operate a motor vehicle under KRS 532.356 for the duration of the ineligibility, upon notification of the court's judgment.

(4) The cabinet or its agent designated in writing for that purpose shall provide any person subject to the suspension, revocation, or withdrawal of their driving privileges, under provisions of this section, an informal hearing. Upon determining that the action is warranted, the cabinet shall notify the person in writing by mailing the notice to the person by first-class mail to the last known address of the person. The hearing shall be automatically waived if not requested within twenty (20) days after the cabinet mails the notice. The hearing shall be scheduled as early as practical within twenty (20) days after receipt of the request at a time and place designated by the cabinet. An aggrieved party may appeal a decision rendered as a result of an informal hearing, and upon appeal an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

(5) The cabinet may suspend the operator's license of any resident upon receiving notice of the conviction of that person in another state of an offense there which, if committed in this state, would be grounds for the suspension or revocation of an operator's license. If a person so convicted is not the holder of a Kentucky operator's license, the cabinet shall deny the person ~~**[him]**~~ **a license** until the person resolves the matter in the other state and complies with the provisions of this chapter ~~**[for the same period as if he had possessed a license and the license had been suspended]**~~**. The cabinet may, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws, forward a notice of that person's conviction to the proper officer in the state of which the convicted person is a resident.**

(6) The Transportation Cabinet is forbidden from suspending or revoking an operator's license or assessing points or any other form of penalty against the license holder for speeding violations or speeding convictions from other states. This subsection shall apply only to speeding violations. This section shall not apply to a commercial driver's license.

(7) Each operator's license which has been canceled, suspended, or revoked shall be

surrendered to and retained by the cabinet. At the end of the period of cancellation, suspension, or revocation, the license may be returned to the licensee after he has complied with all requirements for the issuance or reinstatement of his driving privilege.

(8) Insurance companies issuing motor vehicle policies in the Commonwealth shall be prohibited from raising a policyholder's rates solely because the policyholder's driving privilege has been suspended or denied pursuant to subsection (2) of this section.

KRS 186.6401 Persons required to complete examination [New Section HB 188]

The following persons shall be required to successfully complete the examinations required under KRS 186.480 prior to being issued a Kentucky operator's license:

(1) A person who has been issued a Kentucky instruction permit;
(2) A person who has applied for a Kentucky operator's license under KRS 186.412(4; and
(3) Other persons as identified in an administrative regulation promulgated by the Kentucky State Police under KRS Chapter 13A.

KRS 189A.005 Definitions for chapter – License suspensions [Amended by HB 652]

As used in this chapter, unless the context requires otherwise:

(1) "Alcohol concentration**" means either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath;**

(2) "Ignition interlock device" means a device that connects a motor vehicle ignition system or motorcycle ignition system to a breath alcohol analyzer and prevents a motor vehicle ignition or motorcycle ignition from starting, and from continuing to operate, if a driver's breath alcohol concentration exceeds 0.02, as measured by the device;

(3) "License" means any driver's or operator's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this state including:
  (a) Any temporary license or instruction permit;
  (b) The privilege of any person to obtain a valid license or instruction permit, or to drive a motor vehicle whether or not the person holds a valid license; and
  (c) Any nonresident's operating privilege as defined in KRS Chapter 186 or 189;

(4) "Limited access highway" has the same meaning as "limited access facility" does in KRS 177.220;

(5) **"**Refusal**" means declining to submit to any test or tests pursuant to KRS 189A.103. Declining may be either by word or by the act of refusal. If the breath testing instrument for any reason shows an insufficient breath sample and the alcohol concentration cannot be measured by the breath testing instrument, the law enforcement officer shall then request the defendant to take a blood or urine test in lieu of the breath test. If the defendant then declines either by word or by the act of refusal, he shall then be deemed to have refused if the refusal occurs at the site at which any alcohol concentration or substance test is to be administered;**

(6)~~[(3)]~~ **When age is a factor, it shall mean age at the time of the commission of the offense;** and

(7)~~[(4)]~~ **Unless otherwise provided, license suspensions under this chapter shall be imposed by the court. The court shall impose the applicable period of license suspension enumerated by this chapter and shall include in its order or judgment the length and terms of any suspension imposed. The license suspension shall be deemed effective on the date of entry of the court's order or judgment. The role of the Transportation Cabinet shall be limited to administering the suspension period under the terms and for the duration enumerated by the court in its order or judgment~~[;~~**

~~**(5) "Limited access highway" has the same meaning as "limited access facility" does in KRS 177.220;**~~

~~**(6) "License" means any driver's or operator's license or any other license or permit to operate a motor vehicle issued under or granted by the laws of this state including:**~~
  ~~**(a) Any temporary license or instruction permit;**~~
  ~~**(b) The privilege of any person to obtain a valid license or instruction permit, or to drive a motor vehicle whether or not the person holds a valid license; and**~~
  ~~**(c) Any nonresident's operating privilege as defined in KRS Chapter 186 or 189]**~~**.**

KRS 189A.070 License revocations – Time periods – Completion of alcohol or substance treatment or education program required before reinstatement [Amended by HB 652]

(1) Unless the person is under eighteen (18) years of age, in addition to the penalties specified in KRS 189A.010, a person convicted of violation of KRS 189A.010(1)(a), (b), (c), or (d) shall have his license to operate a motor vehicle or motorcycle revoked by the court as follows:

(a) For the first offense within a five (5) year period, for a period of not less than thirty (30) days nor more than one hundred twenty (120) days;

(b) For the second offense within a five (5) year period, for a period of not less than twelve (12) months nor more than eighteen (18) months;

(c) For a third offense within a five (5) year period, for a period of not less than twenty-four (24) months nor more than thirty-six (36) months; and

(d) For a fourth or subsequent offense within a five (5) year period, sixty (60) months.

(e) For purposes of this section, "offense" shall have the same meaning as described in KRS 189A.010(5)(e).

(2) In determining the five (5) year period under this section, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered.

(3) In addition to the period of license revocation set forth in subsection (1) or (7) **of this section, no person shall be eligible for reinstatement of his privilege to operate a motor vehicle until he has completed the alcohol or substance abuse education or treatment program ordered pursuant to KRS 189A.040.**

(4) A person under the age of eighteen (18) who is convicted of violation of KRS 189A.010(1)(a), (b), (c), or (d) shall have his license revoked by the court until he reaches the age of eighteen (18) or shall have his license revoked as provided in subsection (1) or (7) **of this section, whichever penalty will result in the longer period of revocation** or court-ordered driving conditions**.**

(5) Licenses revoked pursuant to this chapter shall forthwith be surrendered to the court upon conviction. The court shall transmit the conviction records, and other appropriate information to the Transportation Cabinet. A court shall not waive or stay this procedure.

(6) Should a person convicted under this chapter whose license is revoked fail to surrender it to the court upon conviction, the court shall issue an order directing the sheriff or any other peace officer to seize the license forthwith and deliver it to the court.

(7) A person whose license has been revoked pursuant to subsection (1)(b), (c), or (d) of this section may move the court to reduce the applicable minimum period of revocation by one-half (1/2), but in no case less than twelve (12) months. The court may, upon a written finding in the record for good cause shown, order such a period to be reduced by one-half (1/2), but in no case less than twelve (12) months, if the following conditions are satisfied:

(a) The person shall not operate a motor vehicle or motorcycle without an ignition interlock device as provided for in KRS 189A.340(2);

(b) The person shall not operate a motor vehicle or motorcycle at any other time and for any other purposes than those specified by the court; and

(c) The ignition interlock device shall be installed on the motor vehicle or motorcycle for a period of time not less than the applicable minimum period of revocation provided for under subsection (1)(b), (c), or (d) of this section nor for more than the respective maximum period of revocation provided for under subsection (1)(b), (c), or (d) of this section.

(8) Upon a finding of a violation of any of the conditions specified in subsection (7) of this section or of the order permitting any reduction in a minimum period of revocation that is issued pursuant thereto, the court shall dissolve such an order and the person shall receive no credit toward the minimum period of revocation required under subsection (1)(b), (c), or (d) of this section.

KRS 189A.090 Operating motor vehicle while license is revoked or suspended for driving under the influence prohibited – Operating motor vehicle without required ignition interlock device prohibited – Penalties [Amended by HB

652]

(1) No person shall operate or be in physical control of a motor vehicle while his license is revoked or suspended under KRS 189A.010(6), 189A.070, 189A.107, 189A.200, or 189A.220, or operate or be in physical control of a motor vehicle without a functioning ignition interlock device in violation of KRS 189A.345(1).

(2) In addition to any other penalty imposed by the court, any person who violates subsection (1) of this section shall:

(a) For a first offense within a five (5) year period, be guilty of a Class B misdemeanor and have his license revoked by the court for six (6) months, unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class A misdemeanor and have his license revoked by the court for a period of one (1) year;

(b) For a second offense within a five (5) year period, be guilty of a Class A misdemeanor and have his license revoked by the court for one (1) year, unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of two (2) years;

(c) For a third or subsequent offense within a five (5) year period, be guilty of a Class D felony and have his license revoked by the court for two (2) years, unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of five (5) years.

(3) The five (5) year period under this section shall be measured in the same manner as in KRS 189A.070.

(4) After one (1) year of the period of revocation provided for in subsection (2)(b) or (c) of this section has elapsed, a person whose license has been revoked pursuant to either of those subsections may move the court to have an ignition interlock device installed for the remaining portion of the period of revocation. The court may, upon a written finding in the record for good cause shown, order an ignition interlock device installed if the following conditions are satisfied:

(a) The person shall not operate a motor vehicle or motorcycle without an ignition interlock device as provided for in KRS 189A.340(2t;

(b) The person shall not operate a motor vehicle or motorcycle at any other time and for any other purposes than those specified by the court; and

(c) The ignition interlock device shall be installed on the motor vehicle or motorcycle for a period of time not less than the period of revocation required for the person under subsection (2)(b) or (c) of this section.

(5) Upon a finding of a violation of any of the conditions specified in subsection (4) of this section or of the order permitting the installation of an ignition interlock device in lieu of the remaining period of revocation that is issued pursuant thereto, the court shall dissolve such an order and the person shall receive no credit toward the remaining period of revocation required under subsection (2)(b) or (c) of this section.

KRS 189A.340 Ignition interlock devices [Amended by HB 652]

(1)~~[For the purposes of this section and KRS 189A.345 and 189A.410, "ignition interlock device" means a device that connects a motor vehicle ignition system or motorcycle ignition system to a breath alcohol analyzer and prevents a motor vehicle ignition or motorcycle ignition from starting if a driver's breath alcohol concentration, as defined in KRS 189A.005, exceeds 0.02, as measured by the device.~~

~~(2)]~~ In lieu of ordering license plate impoundment under KRS 189A.085 of a person convicted of a second or subsequent violation of KRS 189A.010, the court may order installation of an ignition interlock device as provided in this section as follows:

(a) Except as provided in paragraph (d) of this subsection, at the time that the court revokes a person's license under any provision of KRS 189A.070 other than KRS 189A.070(1)(a), the court shall also order that, at the conclusion of the license revocation, the person shall be prohibited from operating any motor vehicle or motorcycle without a functioning ignition interlock device.

(b) 1. The first time in a five (5) year period that a person is penalized under this section, a functioning ignition interlock device shall be installed for a period of six (6) months.
2. The second time in a five (5) year period that a person is penalized under this section, a functioning ignition interlock device shall be installed for a period of twelve (12) months.
3. The third or subsequent time in a five (5) year period that a person is penalized under this section, a functioning ignition interlock device shall be installed for a period of thirty (30) months.
4. The person whose license has been suspended for a second or subsequent violation of KRS 189A.010 shall not be able to apply to the court for permission to install an ignition interlock device until the person has completed one (1) year of license suspension without any subsequent conviction for a violation of KRS 189A.010 or 189A.090. If the court grants permission to install an ignition interlock device, an ignition interlock device shall be installed on all vehicles owned or leased by the person whose license has been suspended.

(c) In determining the five (5) year period under paragraph (b) of this subsection, the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered, resulting in the license revocations described in KRS 189A.070.

(d) If the court finds that a person is required to operate a motor vehicle or motorcycle in the course and scope of the person's employment and the motor vehicle or motorcycle is owned by the employer, then the court shall order that the person may operate that motor vehicle or motorcycle during regular working hours for the purposes of his or her employment without installation of a functioning ignition interlock device on that motor vehicle or motorcycle if the employer has been notified of the prohibition established under paragraphs (a), (b), and (c) of this subsection.

(2)**[~~(3)~~] Upon ordering the installation of a functioning ignition interlock device, the court, without a waiver or a stay of the following procedure, shall:**

(a) Transmit its order and other appropriate information to the Transportation Cabinet;

(b) Direct that the Transportation Cabinet records reflect:
1. That the person shall not operate a motor vehicle or motorcycle without a functioning ignition interlock device, except as provided in paragraph (d) of subsection **(1)**[~~(2)~~] of this section; and
2. Whether the court has expressly permitted the person to operate a motor vehicle or motorcycle without a functioning ignition interlock device, as provided in paragraph (d) of subsection **(1)**[~~(2)~~] of this section;

(c) Direct the Transportation Cabinet to attach or imprint a notation on the driver's license of any person restricted under this section stating that the person shall operate only a motor vehicle or motorcycle equipped with a functioning ignition interlock device. However, if the exception provided for in paragraph (d) of subsection **(1)**[~~(2)~~] of this section applies, the notation shall indicate the exception;

(d) Require proof of the installation of the functioning ignition interlock device and periodic reporting by the person for the verification of the proper functioning of the device;

(e) Require the person to have the device serviced and monitored at least every **thirty (30)**[~~ninety (90)~~] days for proper functioning by an entity approved by the Transportation Cabinet; and

(f) Require the person to pay the reasonable cost of leasing or buying, installing, servicing, and monitoring the device. The court may establish a payment schedule for the person to follow in paying the cost.

(3)**[~~(4)~~] The Transportation Cabinet shall:**

(a) Certify ignition interlock devices for use in this Commonwealth;

(b) Approve ignition interlock device installers who install functioning ignition interlock devices under the requirements of this section;

(c) Approve servicing and monitoring entities identified in paragraph (e) of subsection **(2)**[~~(3)~~] of this section **and require those entities to report on driving activity within seven (7) days of servicing and monitoring each ignition interlock device to the respective court, prosecuting**

attorney, and defendant;

(d) Publish and periodically update on the Transportation Cabinet web site a list of the certified ignition interlock devices, the approved ignition interlock installers, and the approved servicing and monitoring entities;

(e) Develop a warning label that an ignition interlock device installer shall place on a functioning ignition interlock device before installing that device. The warning label shall warn of the penalties established in KRS 189A.345; and

(f) Promulgate administrative regulations to carry out the provisions of this subsection.

KRS 189A.345 Penalties for violations of KRS 189A.410 and 189A.340 governing ignition interlock devices [Amended by HB 652]

(1) No person shall operate a motor vehicle or motorcycle without a functioning ignition interlock device when prohibited to do so under KRS 189A.340(1)**~~[KRS 189A.340(2)]~~ or under KRS 189A.410(2).**

(2) (a) No person shall start a motor vehicle or motorcycle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle or motorcycle to a person subject to the prohibition established in **KRS 189A.340(1)~~[KRS 189A.340(2)]~~** or under KRS 189A.440(2)(b).

(b) Any person who violates paragraph (a) of this subsection shall:

1. For a first offense, be guilty of a Class B misdemeanor; and
2. For a second or subsequent offense, be guilty of a Class A misdemeanor.

(3) (a) No person shall:

1. Knowingly install a defective ignition interlock device on a motor vehicle or motorcycle; or
2. Tamper with an installed ignition interlock device with the intent of rendering it defective.

(b) Any person who violates paragraph (a) of this subsection shall:

1. For a first offense, be guilty of a Class B misdemeanor; and
2. For a second or subsequent offense, be guilty of a Class A misdemeanor and be prohibited from installing ignition interlock devices or directing others in the installation of ignition interlock devices.

(4) (a) No person shall direct another person to install a defective ignition interlock device on a motor vehicle or motorcycle when the person giving the direction knows that the ignition interlock device is defective.

(b) Any person who violates paragraph (a) of this subsection shall:

1. For a first offense, be guilty of a Class B misdemeanor; and
2. For a second or subsequent offense, be guilty of a Class A misdemeanor and be prohibited from directing others in the installation of ignition interlock devices or installing ignition interlock devices.

KRS 189A.410 Purposes for issuance of hardship license – Use of ignition interlock device may be required- Prohibition against issuance when alcohol or substance test was refused [Amended by HB 652

(1) At any time following the expiration of the minimum license suspension periods enumerated in KRS 189A.010(6), 189A.070, and 189A.107, the court may grant the person hardship driving privileges for the balance of the suspension period imposed by the court, upon written petition of the defendant, if it finds reasonable cause to believe that revocation would hinder the person's ability to:

(a) Continue his employment;

(b) Continue attending school or an educational institution;

(c) Obtain necessary medical care;

(d) Attend driver improvement, alcohol, or substance abuse education programs; or

(e) Attend court-ordered counseling or other programs.

(2) Whenever the court grants a person hardship driving privileges under subsection (1) of this section, the court through court order, may:

(a) Prohibit the person from operating any motor vehicle or motorcycle without a functioning ignition interlock device **~~[, as defined in KRS 189A.340(1)]~~;**

(b) Require that the person comply with all of the requirements of KRS 189A.340, except for the requirements found in **KRS 189A.340(1~~[KRS 189A.340(2)]~~**; and

(c) Require the person to install an ignition interlock device on every vehicle owned or

leased by the person who is permitted to operate a motor vehicle under this section.

(3) The court shall not issue a hardship license to a person who has refused to take an alcohol concentration or substance test or tests offered by a law enforcement officer.

218A.1412 Trafficking in controlled substance in first degree; penalties

(1) A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; or a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers**; gamma hydroxybutryric acid (GHB), including its salts, isomers, salts of isomers and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.**

(2) Any person who violates the provisions of subsection (1) of this section shall:

(a) For the first offense be guilty of a Class C felony.

(b) For a second or subsequent offense be guilty of a Class B felony.

218a.1415 Possession of controlled substance in first degree; penalties

(1) A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers or, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine, **gamma hydroxybutryric acid (GHB), including its salts, isomers, salts of isomers and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.**

(2) Possession of a controlled substance in the first degree is:

(a) For a first offense a Class D felony.

(b) For a second or subsequent offense a Class C felony.

KRS 218A.1437 Possession of a methamphetamine precursor

(1) A person is guilty of unlawful possession of a methamphetamine precursor when he or she knowingly and unlawfully possesses a drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, with the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

(2) (a) Except as provided in paragraph (b) of this subsection, possession of a drug product or combination of drug products containing more than twenty-four (24) grams of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, shall constitute prima facie evidence of the intent to use the drug product or combination of drug products as a precursor to methamphetamine or other controlled substance.

(b) The prima facie evidence referred to in paragraph (a) of this subsection shall not apply to the following persons who lawfully possess a drug product or combination of drug products listed in subsection (1) of this section in the course of legitimate business:

1. A retail distributor of drug products or wholesaler of drug products or its agent;

2. A wholesale drug distributor, or its agent, issued a permit by the Board of Pharmacy;
3. A pharmacist licensed by the Board of Pharmacy;
4. A pharmacy permitted by the Board of Pharmacy;
5. A licensed health care professional possessing the drug products in the course of carrying out his or her profession;
6. A trained chemist working in a properly equipped research laboratory in an education, government, or corporate setting; or
7. A common carrier under contract with any of the persons or entities set out in subparagraphs 1. to 6. of this paragraph.
(3) Unlawful possession of a methamphetamine precursor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

KRS 218A.1438 Distribution of a methamphetamine precursor

(1) A person is guilty of unlawful distribution of a methamphetamine precursor when he or she knowingly and unlawfully sells, transfers, distributes, dispenses, or possesses with the intent to sell, transfer, distribute, or dispense any drug product or combination of drug products containing ephedrine, pseudoephedrine, or phenylpropanolamine, or any of their salts, isomers, or salts of isomers, if the person knows that the purchaser intends that the drug product or combination of drug products will be used as a precursor to methamphetamine or other controlled substance, or if the person sells, transfers, distributes, or dispenses the drug product or combination of drug products with reckless disregard as to how the drug product or combination of drug products will be used.

(2) Unlawful distribution of a methamphetamine precursor is a Class D felony for the first offense and a Class C felony for each subsequent offense.

KRS 508.025 Assault in the third degree

(1) A person is guilty of assault in the third degree when the actor:

(a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:

1. A state, county, city, or federal peace officer;

2. An employee of a detention facility, or state residential treatment facility or state staff secure facility for residential treatment which provides for the care, treatment, or detention of a juvenile charged with or adjudicated delinquent because of a public offense or as a youthful offender;

3. An employee of the Department for Community Based Services employed as a social worker to provide direct client services, if the event occurs while the worker is performing job related duties; or

4. A probation and parole officer; or

5. A transportation officer appointed by a county fiscal court or legislative body of a consolidated local government, urban-county government, or charter government to transport inmates when the county jail or county correctional facility is closed while the transportation officer is performing job related duties; or

6. A public or private elementary or secondary school or school district classified or certified employee, school bus driver, or other school employee acting in the course and scope of the employee's employment; or

7. A public or private elementary or secondary school or school district volunteer acting in the course and scope of that person's volunteer service for the school or school district; or

(b) Being a person confined in a detention facility, or state residential treatment facility or state staff secure facility for residential treatment which provides for the care, treatment, or detention of a juvenile charged with or
adjudicated delinquent because of a public offense or as a youthful offender, inflicts physical injury upon or throws or causes feces, or urine, or other bodily fluid to be thrown upon an employee of the facility.

(2) Assault in the third degree is a Class D felony.

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KRS 508.130 Definitions for KRS 508.130 to 508.150

As used in KRS 508.130 to 508.150, unless the context requires otherwise:

(1) (a) To "stalk" means to engage in an intentional course of conduct:

1. Directed at a specific person or persons;

2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and

3. Which serves no legitimate purpose.

(b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

(2) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." If the defendant claims that he was engaged in constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence.

(3) "Protective order" means:

(a) An emergency protective order or domestic violence order issued under KRS 403.715 to 403.785;

(b) A foreign protective order, as defined in KRS 403.7521(1);

(c) An order issued under KRS 431.064; and

(d) A restraining order issued in accordance with Section 2 of this Act; and

(e) Any condition of a bond, conditional release, probation, parole, or pretrial diversion order designed to protect the victim from the offender.
KRS 508.

(1) A verdict of guilty or a plea of guilty to KRS 508.140 or 508.150 shall operate as an application for a restraining order limiting the contact of the defendant and the victim who was stalked, unless the victim requests otherwise.

(2) The court shall give the defendant notice of his or her right to request a hearing on the application for a restraining order. If the defendant waives his or her right to a hearing on this matter, then the court may issue the restraining order without a hearing.

(3) If the defendant requests a hearing, it shall be held at the time of the verdict or plea of guilty, unless the victim or defendant requests otherwise. The hearing shall be held in the court where the verdict or plea of guilty was entered.

(4) A restraining order may grant the following specific relief:

(a) An order restraining the defendant from entering the residence, property, school, or place of employment of the victim; or
(b) An order restraining the defendant from making contact with the victim, including an order forbidding the defendant from personally, or through an agent, initiating any communication likely to cause serious alarm, annoyance, intimidation, or harassment including, but not limited to, personal, written, telephonic, or any other form of written or electronic communication or contact with the victim. An order issued pursuant to this subsection relating to a school, place of business, or similar nonresidential location shall be sufficiently limited to protect the stalking victim but shall also protect the defendant's right to employment, education, or the right to do legitimate business with the employer of a stalking victim as long as the defendant does not have contact with the stalking victim. The provisions of this subsection shall not apply to a contact by an attorney regarding a legal matter.

(5) A restraining order issued pursuant to this section shall be valid for a period of not more than ten (10) years, the specific duration of which shall be determined by the court. Any restraining order shall be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim, his or her immediate family, or both.

(6) Unless the defendant has been convicted of a felony, or is otherwise ineligible to purchase or possess a firearm under federal law, a restraining order issued pursuant to this section shall not operate as a ban on the purchase or possession of firearms or ammunition by the defendant.

(7) The restraining order shall be issued on a form prescribed by the Administrative Office of the Courts and may be lifted upon application of the stalking victim to the court which granted the order.

(8) Within twenty-four (24) hours of entry of a restraining order or entry of an order rescinding a restraining order, the circuit clerk shall forward a copy of the order to the Law Information Network of Kentucky (LINK).

(9) A restraining order issued under this section shall be enforced in any county of the Commonwealth. Law enforcement officers acting in good faith in enforcing a restraining order shall be immune from criminal and civil liability.

(10) A violation by the defendant of an order issued pursuant to this section shall be a Class A misdemeanor. Nothing in this section shall preclude the filing of a criminal complaint for stalking based on the same act which is the basis for the violation of the restraining order.

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KRS 509.040 KIDNAPPING

(1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:

(a) To hold him for ransom or reward; or

(b) To accomplish or to advance the commission of a felony; or

(c) To inflict bodily injury or to terrorize the victim or another; or

(d) To interfere with the performance of a governmental or political function; or

(e) To use him as a shield or hostage.

(f) To deprive the parents or guardian of the custody of a minor, when the person taking the minor is not a person exercising custodial control or supervision of the minor as the term "person exercising custodial control or supervision" is defined in KRS 600.020.

(2) Kidnapping is a Class B felony when the victim is released alive and in a safe place prior to trial, except as provided in this section. Kidnapping is a Class A felony when the victim is released alive but the victim has suffered serious physical injury during the kidnapping, or as a result of not being released in a safe place, or as a result of being released in any circumstances which are intended, known or should have been known to cause or lead to serious physical injury. Kidnapping is a capital offense when the victim is not released alive or when the victim is released alive but subsequently dies as a result of:

(a) Serious physical injuries suffered during the kidnapping; or

(b) Not being released in a safe place; or

(c) Being released in any circumstances which are intended, known or should have been known to cause or lead to the victim's death.

KRS 510.010 Definitions for chapter (abridged)

The following definitions apply in this chapter unless the context otherwise requires:

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to any act. **"Physically helpless" also includes a person who has been rendered unconscious or for any other reason is physically unable to communicate an unwillingness to an act as a result of the influence of a controlled substance or legend drug;**

KRS 510.050 Rape in the second degree

(1) A person is guilty of rape in the second degree when;

(a) Being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old**; or**

(b) He engages in sexual intercourse with another person who is mentally incapacitated.

(2) Rape in the second degree is a Class C felony.

KRS 510.060 Rape in the third degree

(1) A person is guilty of rape in the third degree when:

(a) He engages in sexual intercourse with another person who is incapable of consent because he is mentally retarded ~~**or mentally incapacitated;**~~ or

(b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old.

(c) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.

(2) Rape in the third degree is a Class D felony.

KRS 510.080 Sodomy in the second degree

(1) A person is guilty of sodomy in the second degree when;

(a) Being eighteen (18) years old or more, he engages in deviate sexual intercourse with another person less than fourteen (14) years old; **or**

(b) He engages in deviate sexual intercourse with another person who is mentally incapacitated.

(2) Sodomy in the second degree is a Class C felony.

510.090 Sodomy in the third degree

(1) A person is guilty of sodomy in the third degree when:

(a) He engages in deviate sexual intercourse with another person who is incapable of consent because he is mentally retarded ~~**or mentally incapacitated; or**~~

(b) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than sixteen (16) years old; **or**

(c) Being twenty-one (21) years old or more, he engages in deviate sexual intercourse with another person less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.

(2) Sodomy in the third degree is a Class D felony.

KRS 510.110 Sexual abuse in the first degree

(1) A person is guilty of sexual abuse in the first degree when:

(a) He subjects another person to sexual contact by forcible compulsion; or

(b) He subjects another person to sexual contact who is incapable of consent because he:

1. Is physically helpless; or

2. Is less than twelve (12) years old; or

3. Is mentally incapacitated.

(2) Sexual abuse in the first degree is a Class D felony.

KRS 510.120 Sexual abuse in the second degree

(1) A person is guilty of sexual abuse in the second degree when:

(a) He subjects another person to sexual contact who is incapable of consent because he is mentally retarded or mentally incapacitated;

(b) He subjects another person who is less than fourteen (14) years old to sexual contact; or

(c) Being an employee, contractor, vendor, or volunteer of the Department of Corrections, or a detention facility as defined in KRS 520.010, or of an entity under contract with either the department or a detention facility for the custody, supervision, evaluation, or treatment of offenders, he subjects an offender who is incarcerated, supervised, evaluated, or treated by the Department of Corrections, the detention facility, or the contracting entity, to sexual contact. In any prosecution under this paragraph, the defendant may prove in exculpation that, at the time he engaged in the conduct constituting the offense, he and the offender were married to each other.

(d) Being twenty-one (21) years or more, he subjects another person to sexual contact who is less than eighteen (18) years old and for whom he provides a foster family home as defined in KRS 600.020.

(2) Sexual abuse in the second degree is a Class A misdemeanor.

KRS 524.040 Intimidating a ~~witness~~ participant in the legal process.

(**1) A person is guilty of intimidating a ~~witness~~ participant in the legal process when, by use of physical force or a threat directed to ~~a witness or~~ a person he believes ~~may be called as a witness in any official proceeding~~, to be a participant in the legal process he or she:**

(a) Influences, or attempts to influence, the testimony, **vote, decision, or opinion** of that person;

(b) Induces, or attempts to induce, that person to avoid legal process summoning him **or her** to testify;

(c) Induces, or attempts to induce, that person to absent himself **or herself** from an official proceeding to which he has been legally summoned;

(d) Induces, or attempts to induce, that person to withhold a record, document, or other object from an official proceeding;

(e) Induces, or attempts to induce, that person to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; or

(f) Hinders, delays, or prevents the communication to a law enforcement officer or judge of information relating to the possible commission of an offense or a violation of conditions of probation, parole or release pending judicial proceedings.

(2) For purposes of this section:

(a) An official proceeding need not be pending or about to be instituted at the time of the offense; and

(b) The testimony, record, document or other object need not be admissible in evidence or free of a claim of privilege.

~~(3) "Threat" as used in this section means any threat proscribed in KRS 514.080.~~

(3) Intimidating a ~~witness~~ **participant in the legal process** is a Class D felony.

(4) In order for a person to be convicted of a violation of this section, the act against a participant in the legal process or the immediate family of a participant in the legal process shall be related to the performance of a duty or role played by the participant in the legal process.

KRS 524.050 Tampering with a witness

(1) A person is guilty of tampering with a witness when, knowing that a person is or may be called as a witness in an official proceeding, he:

(a) Induces or attempts to induce the witness to absent himself or otherwise avoid appearing or testifying at the official proceeding with intent to influence the outcome thereby; or

(b) Knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of the witness.

(2) Tampering with a witness is a ~~misdemeanor~~ **Class D felony.**

KRS 524.055 Retaliating against a ~~witness~~ participant in the legal process

(1) A person is guilty of retaliating against a ~~witness~~ participant when he **or she** engages or threatens to engage in conduct causing or intended to cause bodily injury or damage to the tangible property of a ~~witness~~ participant in the legal process or a person he **or she** believes may be called as a ~~witness~~ **participant in the legal process** in any official proceeding **or because the person has participated in a legal proceeding** ~~for the witness's:~~

(a) Attending an official proceeding, or giving or producing any testimony, record, document, or other object produced at that proceeding; or

(b) Giving information to a law enforcement officer relating to the possible commission of an offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

(c) Vote, decision, or opinion; or

(d) Performance of his or her duty.

(2) Retaliating against a ~~witness~~ **participant in the legal process** is a Class D felony.

(3) In order for a person to be convicted of a violation of this section, the act against a participant in the legal process or the immediate family of a participant in the legal process shall be related to the performance of a duty or role played by the participant in the legal process.

KRS 524.090 Jury tampering

(1) A person is guilty of jury tampering when, with intent to influence a juror's vote, opinion, decision or other action in a case, he communicates or attempts to communicate, directly or indirectly, with a juror other than as a part of the proceedings in the trial of the case.

(2) Jury tampering is a ~~**A misdemeanor**~~ **Class D felony.**

REPEALED
KRS 524.045 Harassing a witness
KRS 524.080 Intimidating a juror
KRS 524.090 Jury tampering
KRS 524.120 Intimidating a judicial officer

KRS 525.010 Definitions for chapter (Abridged)

The following definitions apply in this chapter unless the context otherwise requires:

...
h) "~~**Guide**~~ **Assistance** dog," which means any dog that is trained to meet the requirements of KRS 258.500;

KRS 527.020 Carrying concealed deadly weapon

(1) A person is guilty of carrying a concealed weapon when he carries concealed a firearm or other deadly weapon on or about his person.

(2) Peace officers, when necessary for their protection in the discharge of their official duties; United States mail carriers when actually engaged in their duties; and agents and messengers of express companies, when necessary for their protection in the discharge of their official duties, may carry concealed weapons on or about their person.

(3) Policemen directly employed by state, county, city, or urban-county governments may carry concealed deadly weapons on or about their person at all times within the Commonwealth of Kentucky, when expressly authorized to do so by the government

employing the officer.

(4) Person**s, except those specified in subsection (5) of this section,** licensed to carry a concealed deadly weapon pursuant to KRS 237.110 may carry a firearm or other concealed deadly weapon on or about their persons at all times within the Commonwealth of Kentucky, if the firearm or concealed deadly weapon is carried in conformity with the requirements of that section. Unless otherwise specifically provided by the Kentucky Revised Statutes or applicable federal law, no criminal penalty shall attach to carrying a concealed firearm or other deadly weapon with a permit at any location at which an unconcealed firearm or other deadly weapon may be constitutionally carried. **No person or organization, public or private, shall prohibit a person licensed to carry a concealed deadly weapon from possessing a firearm, ammunition, or both, or other deadly weapon in his or her vehicle in compliance with the provisions of KRS 237.110 and 237.115. Any attempt by a person or organization, public or private, to violate the provisions of this subsection may be the subject an action for appropriate relief or for damages in a Circuit Court or District Court of competent jurisdiction.**

(5) The following persons, if they hold a license to carry a concealed deadly weapon pursuant to KRS 237.110, may carry a firearm or other concealed deadly weapon on or about their persons at all times and at all locations within the Commonwealth of Kentucky, without limitation:

(a) A Commonwealth's attorney or assistant Commonwealth's attorney;

(b) A county attorney or assistant county attorney;

(c) A justice or judge of the Court of Justice; and

(d) A retired or senior status justice or judge of the Court of Justice.

A person specified in this section who is issued a concealed deadly weapon license shall be issued a license which bears on its face the statement that it is valid at all locations within the Commonwealth of Kentucky and may have such other identifying characteristics as determined by the Department of State Police.

(6) The following persons may carry concealed deadly weapons on or about their person at all times and at all locations within the Commonwealth of Kentucky:

(a) An elected sheriff and full-time and part-time deputy sheriffs certified pursuant to KRS 15.380 to 15.404 when expressly authorized to do so by the unit of government employing the officer;

(b) An elected jailer and a deputy jailer who has successfully completed Department of Corrections basic training and maintains his or her current in-service training when expressly authorized to do so by the jailer;

(c) The department head or any employee of a corrections department in any jurisdiction where the office of elected jailer has been merged with the office of sheriff who has successfully completed Department of Corrections basic training and maintains his or her current in-service training when expressly authorized to do so by the unit of government by which he or she is employed;

(7) A full-time paid peace officer of a government agency from another state or territory of the United States or an elected sheriff from another territory of the United States may carry a concealed deadly weapon in Kentucky, on or off duty, if the other state or territory accords a Kentucky full-time paid peace officer and a Kentucky elected sheriff the same rights by law. If the other state or territory limits a Kentucky full-time paid peace officer or elected sheriff to carrying a concealed deadly weapon while on duty, then that same restriction shall apply to a full-time paid peace officer or elected sheriff from that state or territory.

(8) A firearm or other deadly weapon shall not be deemed concealed on or about the person if it is located in a glove compartment, regularly installed in a motor vehicle by its manufacturer regardless of whether said compartment is locked, unlocked, or does not have a locking mechanism. **No person or organization, public or private, shall prohibit a person from keeping a firearm or ammunition, or both, or other deadly weapon in a glove compartment of a vehicle in accordance with the provisions of this subsection. Any attempt by person or organization, public or private, to violate the provisions of this subsection may be the subject of an action for appropriate relief or for damages in a Circuit Court or District Court of competent jurisdiction.**

(9) Carrying a concealed weapon is a Class A misdemeanor unless the defendant has been

previously convicted of a felony in which a deadly weapon was possessed, used or displayed in which case it is a Class D felony.

KRS 531. 090 Voyeurism

(1) A person is guilty of voyeurism when:

(a) He or she intentionally:

(1) Uses or causes the use of any camera, videotape, photooptical, photoelectric, or other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping the sexual conduct, genitals, or nipple of the female breast of another person without that person's consent; or

(2) Uses the unaided eye or any device designed to improve visual acuity for the purpose of observing or viewing the sexual conduct, genitals, or nipple of the female breast or another person without that person's consent; or

(3) Enters or remains unlawfully in or upon the premises of another for the purpose of observing or viewing the sexual conduct, genitals, or nipple of the female breast without the person's consent; and

(b) The other person is in a place where a reasonable person would believe that his or her sexual conduct, genitals, or nipple of the female breast will not be observed, viewed, photographed, filmed, or videotaped without his or her knowledge.

(2) The provisions of subsection (1) of this section shall not apply to:

(a) A law enforcement officer during a lawful criminal investigation; or

(b) An employee of the Department of Corrections, the Department of Juvenile Justice, a private prison, a local jail, or a local correctional facility whose actions have been authorized for security or investigative purposes.

(3) Unless objected to by the victim or victims of voyeurism, the court on its own motion or on motion of the Commonwealth's attorney shall:

(a) Order the sealing of all photographs, film, videotapes, or other images that are introduced into evidence during a prosecution under this section or are in the possession of law enforcement, the prosecution, or the court as a result of a prosecution under this section; and

(b) At the conclusion of a prosecution under this section, unless required for additional prosecutions, order the destruction of all of the photographs, film, videotapes, or other images that are in possession of law enforcement, the prosecution, or the court.

(4) Voyeurism is a Class A misdemeanor.

KRS 531.100 Video Voyeurism

(1) A person is guilty of video voyeurism when he or she intentionally:

(a) Uses or causes the use of any camera, videotape, photooptical, photoelectric, or other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping the sexual conduct, genitals, or nipple of the female breast of another person without that person's consent; and
(b) Uses or divulges any image so obtained for consideration; or
(c) Distributes any image so obtained by live or recorded visual medium, electronic mail, the Internet, or a commercial on-line service.
(2) Video voyeurism is a Class D felony.

KRS 531.105 Exemptions

The provisions of Section 1 of this Act shall not apply to the transference of prohibited images by a telephone company, a cable television company or any of its affiliates, an Internet provider, or a commercial on-line service provider, or to the carrying, broadcasting, or performing of related activities in providing telephone, cable television, Internet, or commercial on-line services.

KRS 531.110 Evidence to be sealed and destroyed

Unless objected to by the victim or victims of the video voyeurism, the court, on its own motion, or on motion of the attorney for the Commonwealth shall:

(1) Order all photographs, films, videotapes, or other images that are introduced into evidence or are in the possession of law enforcement, the prosecution, or the court to be sealed; and

(2) At the conclusion of the case, unless required for additional prosecutions, order all of the photographs, film, videotapes, or other images that are in the possession of law enforcement, the prosecution, or the court to be destroyed.

Statutes regarding Civil Liability for Local and State Law Enforcement Officers

Claims Against Local Governments (local officers only)

65.200 DEFINITIONS FOR KRS 65.2001 TO 65.2006

As used in KRS 65.2001 to 65.2006, unless the context otherwise requires:

(1) "Action in tort" means any claim for money damages based upon negligence, medical malpractice, intentional tort, nuisance, products liability and strict liability, and also includes any wrongful death or survival-type action.

(2) "Employee" means any elected or appointed officer of a local government, or any paid or unpaid employee or agent of a local government, provided that no independent contractor nor employee nor agent of an independent contractor shall be deemed to be an employee of a local government.

(3) "Local government" means any city incorporated under the law of this Commonwealth, the offices and agencies thereof, any county government or fiscal court, any special district or special taxing district created or controlled by a local government.

65.2002 AMOUNT OF DAMAGES RECOVERABLE AGAINST LOCAL GOVERNMENTS

The amount of damages recoverable against a local government for death, personal injury or property damages arising out of a single accident or occurrence, or sequence of accidents or occurrences, shall not exceed the total damages suffered by plaintiff, reduced by the percentage of fault including contributory fault, attributed by the trier of fact to other parties, if any.

65.2004 PERIODIC PAYMENT OF DAMAGES

(1) Upon motion of a local government against which final judgment has been rendered for a claim within the scope of KRS 65.200 to 65.2006, the court, in accordance with subsection (2) of this section, may include in such judgment a requirement that the judgment be paid in whole or in part by periodic payments. Periodic
payments may be ordered paid over a period of time not exceeding ten (10) years. Any periodic payment, upon becoming due under the terms of the judgment, shall constitute a separate judgment. Any judgment ordering any such payments shall specify the total amount awarded, the amount of each payment, the interval between payments and the number of payments to be paid under the judgment. Judgments paid pursuant to this section shall bear interest accruing from the date final judgment is entered, at the interest rate as specified in KRS 360.040. For good cause shown, the court may modify such judgment with respect to the amount of such payments and the number of payments, but the total amount of damages awarded by such judgment shall not be subject to modification in any event and periodic payments shall not be ordered paid over a period in excess of ten (10) years.

(2) A court may order periodic payment only upon finding that:

(a) Payment of the judgment is not totally covered by insurance; and

(b) Funds for the current budget year and other funds of the local government which lawfully may be utilized to pay judgments are insufficient to finance both the adopted budget of expenditures for the year and the payment of that portion of the judgment not covered by insurance.

65.2003 CLAIMS DISALLOWED

Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:

(1) Any claim by an employee of the local government which is covered by the Kentucky workers' compensation law;

(2) Any claim in connection with the assessment or collection of taxes;

(3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:

(a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;
(b) The failure to enforce any law;

(c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;

(d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or

(e) Failure to make an inspection.

Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

65.2005 DEFENSE OF EMPLOYEE BY LOCAL GOVERNMENT; LIABILITY OF EMPLOYEE

(1) A local government shall provide for the defense of any employee by an attorney chosen by the local government in any action in tort arising out of an act or omission occurring within the scope of his employment of which it has been given notice pursuant to subsection (2) of this section. The local government shall pay any judgment based thereon or any compromise or settlement of the action except as provided in subsection (3) of this section and except that a local government's responsibility under this section to indemnify an employee shall be subject to the limitations contained in KRS 65.2002.

(2) Upon receiving service of a summons and complaint in any action in tort brought against him, an employee shall, within ten (10) days of receipt of service, give written notice of such action in tort to the executive authority of the local government.

(3) A local government may refuse to pay a judgment or settlement in any action against an employee, or if a local government pays any claim or judgment against any employee pursuant to subsection (1) of this section, it may recover from such employee the amount of such payment and the costs to defend if:

(a) The employee acted or failed to act because of fraud, malice, or corruption;

(b) The action was outside the actual or apparent scope of his employment;

(c) The employee willfully failed or refused to assist the defense of the cause of action, including the failure to give notice to the executive authority of the local government pursuant to subsection (2) of this section;

(d) The employee compromised or settled the claim without the approval of the governing body of the local government; or

(e) The employee obtained private counsel without the consent of the local government, in which case, the local government may also refuse to pay any legal fees incurred by the employee.

Kentucky State Employees

12.211 DEFENSE OF CIVIL ACTION AGAINST STATE EMPLOYEE BY ATTORNEY GENERAL

Upon request of an employee or former employee, the Attorney General may provide for the defense of any civil action brought against such employee in his official or individual capacity, or both, on account of an act or omission made in the scope and course of his employment as an employee of the Commonwealth and any of its agencies, except that neither the state, state employee, nor former state employee shall be subject to an action arising from discretionary acts or decisions pertaining to the design or construction of public highways, bridges, or buildings.

12.213 GOVERNOR TO PROVIDE BY REGULATION THE METHODS FOR DEFENSE OF STATE EMPLOYEES

The Governor shall provide by regulation for the defense of employees or former employees of the Commonwealth pursuant to KRS 12.211 to 12.215 by one (1) or more of the following methods:

(1) By the Attorney General;

(2) By employing other counsel for this purpose as provided for in KRS 12.210;

(3) By authorizing the purchase of insurance which requires that the insurer provide or underwrite the cost of the defense; or

(4) By authorizing defense by counsel assigned to or employed by the department, agency, board, commission, bureau, or authority which employed the person requesting the defense.

12.212 ATTORNEY GENERAL MAY DECLINE TO

DEFEND WHEN CERTAIN CIRCUMSTANCES EXIST

(1) The Attorney General may decline to provide for the defense of a civil action brought against an employee or former employee if he determines that:

(a) The act or omission was not within the scope and course of his employment as a state employee; or

(b) The employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice on his part; or

(c) Defense of the action by the Commonwealth would create a conflict of interest between the Commonwealth and the employee or former employee; or

(d) Defense of the action would not be in the best interests of the Commonwealth.

(2) The Attorney General may delegate his authority to make these determinations to the chief administrative authority of any agency, institution, board, or commission whose employees are to be defended.

10 KAR 1:010. Defense of employees.

Section 1. Definitions. When used in this administrative regulation:

(1) "Claim" means a claim whether or not a suit has been filed.
(2) "Civil action" means a civil suit filed in a state or federal court.
(3) "Defendant" means an employee or former employee of the Commonwealth who has been sued in a civil action over acts or omissions of a discretionary nature.
(4) "State agency" means any department, administrative body, division or program cabinet acting for the Commonwealth but does not include local units of government such a school districts, counties, sewer districts or other municipalities.
(5) "Acts and omissions liability insurance" means insurance to cover the cost of defending civil actions covered under this Act and paying judgments or settlements resulting therefrom.
Section 2. Notice of Claim; Investigation. An employee or former employee against whom a claim is made which may result in a civil action against him on account of an act or omission made in the course of his employment by a state agency should immediately report said claim and the circumstances surrounding the claim to the Attorney General. The Attorney General, if he thinks it warranted, may cause an investigation of the claim to be made by a regular or special investigator of his office.
Section 3. Application for Defense; Response. (1) Any person desiring the Attorney General to provide for his defense under this Act shall make a written request to the Attorney General and shall submit with the request a copy of the summons, complaint and all other papers, documents and exhibits pertaining to the action.
(2) The Attorney General shall make a timely response to the court by filing an answer or motion for the defendant provided the application for defense is received by the Attorney General at least ten (10) days before a pleading is due. The filing of a pleading in the case shall not commit the Attorney General to continue the defense if the Attorney General has not reached a final decision and notified the defendant that his defense will be provided.
(3) Upon receiving an application for defense, the Attorney General, after such investigation and research as he deems necessary, taking into consideration those factors set out in KRS 12.212, shall decide and notify the defendant whether defense will be provided, and if so, by what method set out in Section 4 of this administrative regulation. The Attorney General shall not be responsible for the defense of a defendant unless written acceptance of the defense has been made by the Attorney General.
(4) In every case where the Attorney General has made a general delegation of his discretionary power to decide when to provide defense to other authority in state government, such authority shall make the decision and the application for defense provided by this section need not be made to the Attorney General, provided that in such cases the authority making the decision shall provide legal counsel for the defense. All settlements made in such cases shall, however, be approved by the Attorney General as provided by Section 6 of this administrative regulation.
Section 4. Methods of Defense. (1) Except where the defendant is covered by insurance as provided in Section 5 of this administrative regulation, defense to a civil action may be provided in any of the following manners:
(a) The Attorney General may assign an assistant attorney general or a special assistant attorney general employed for that purpose to handle the case to conclusion by either settlement or final adjudication.
(b) The Governor or any department with the approval of the Governor may assign a regularly employed attorney under KRS 12.210 or an attorney employed under a personal service contract to handle the case as in paragraph (a) of this subsection.
(c) Any state agency may assign its employed counsel to handle the case.

(2) Regardless of the method of defense provided no settlement of litigation being defended under this administrative regulation shall be made without the approval of the Attorney General, except as provided in Section 6 of this administrative regulation.

(3) A defendant who has requested defense under this administrative regulation may elect to provide his defense by counsel employed by the defendant and in such case shall notify the counsel employed by the state of his election in writing.

Section 5. Insurance. (1) Any state agency or class of state agencies may be authorized by the Governor to purchase acts and omissions liability insurance for the protection of its employees and the benefit of the public.

(2) Any state agency which believes it is economically feasible to purchase acts or omissions liability insurance may request the Governor for authority to do so. The agency's request shall be documented with data as to the history of claims, probable cost of the insurance and any reasons it believes insurance is advisable for said agency.

(3) Any policy of acts and omissions liability insurance purchased by a state agency shall provide a maximum coverage of $50,000 for each claim. Nothing in this administrative regulation shall be deemed to waive the sovereign immunity of the Commonwealth with respect to a claim covered by this administrative regulation or to authorize the payment of a judgment or settlement against a state employee in excess of the limit provided in any acts or omissions liability insurance purchased by a state agency.

(4) KRS 44.055 authorizes state agencies to purchase policies of insurance covering vehicles owned by the state. For this reason "defendant," as defined in Section 1(3) of this administrative regulation, does not include a person being sued for negligence in the operation of a state vehicle.

Section 6. Settlements. (1) Any counsel assigned by a state agency or the Attorney General may recommend to the Attorney General the settlement of a civil action against a defendant under this administrative regulation. If the Attorney General approves the settlement recommended he shall notify the Secretary of the Finance and Administration Cabinet by written memorandum and if the Secretary concurs in this recommendation the Secretary shall issue a voucher to the State Treasurer for payment of the settlement. No settlement shall be made or paid without the prior approval of the Attorney General.

(2) Guidelines for settlements. No settlement should be recommended unless the assigned counsel believes:

(a) The claim is legally valid,

(b) There is a strong probability of a judgment being rendered against the defendant,

(c) The settlement is a reasonable compromise in light of the nature of the claim.

(3) Defense counsel shall document the reasons for recommending a settlement in writing to the Attorney General and the documentation shall be a public record open to public inspection.

(4) This section shall not apply to any settlement reached by a defendant or his insurer which results in no cost to the Commonwealth.

Section 7. Cost of Administration. The Attorney General shall be reimbursed for the cost to his office for the administration of KRS 12.211 to 12.215 upon vouchers submitted by the Attorney General and approved by the Secretary of the Finance and Administration Cabinet.

FOREIGN NATIONALS/ALIENS, DIPLOMATS AND CONSULS (Federal Requirements)

Diplomatic/Consular Officers

Diplomats are representatives of a recognized foreign government who are accredited by that government and are accepted by our government. There are many different types or levels of diplomats including ambassadors, consuls, charge d'affaires, and ministers. Each level of diplomat has its own degree of immunity from civil and/or criminal action. In addition, this immunity may extend beyond that of diplomats themselves and may include the entire family.

Those diplomats who have immunity may not be arrested or prosecuted. If a person who claims to have diplomatic immunity has committed an offense, you may detain that person long enough to confirm whether they are in fact protected by diplomatic immunity.

The possession of a diplomatic passport by an individual does not in and of itself indicate that the holder has diplomatic immunity. Verification of diplomatic immunity may be obtained through the United States Department of State's Office of Protocol in Washington, D.C. During normal working hours the State Department may be reached at (202) 647-1664 or (202) 647-1405. After working hours and on weekends, calls should be made to the Diplomatic Security Watch Officer at (202) 647-7277. Send copies of incident reports and citations to (Fax) (202) 895-3613.

Should you find that you have detained a diplomat with full immunity, you MUST release them.

Any writ or process issues against a person holding or possessing diplomatic immunity is null and void, without regard to whether or not the writ or process is civil or criminal in nature. In fact, any person who knowingly obtains or executes such a writ or process may be liable for a fine and/or imprisonment. The one exception to this rule is the issuance of parking citations and similar traffic related offenses.

The right to operate a motor vehicle, obtain State Department diplomatic tags, and utilize an operator's permit in the host nation (the United States) is not an issue of diplomatic immunity. Officers may issue citations to diplomats but not arrest the operator if the operator is a diplomat with immunity. It is also recognized that officers may forbid the further operation of a vehicle by an intoxicated driver, regardless of the immunity involved. While the operator, if immune, cannot be arrested, the public safety issue may restrict the movement of the vehicle until a sober and licensed driver can operate the vehicle.

Persons having diplomatic immunity cannot be required to appear in court as a defendant or as a witness for any reason. In order to have them testify, it is necessary for them to volunteer or to request their government waive their immunity for that purpose.

It is a Federal crime for any person to strike, wound, imprison or offer violence to the person of a diplomatic officer and an offender is subject to fine and/or imprisonment under Federal law as well as being subject to possible prosecution under applicable state statutes which apply to such criminal conduct.

Any and all illegal or criminal acts perpetrated by diplomats should be reported to the Department of State to take whatever action they deem to be appropriate. They may declare a diplomat to be persona non grata and have that diplomat leave the country.

A foreign embassy or other diplomatic mission is considered to be foreign soil. Therefore we have no right to enter onto that property without the permission of an official at that mission. This holds true even in circumstances where a fire has broken out in the mission itself or where people are shooting from the mission, as occurred in London several years ago.

Aliens

Aliens are all persons in the United States who are not citizens. Aliens may be here on a temporary basis, such as those with student visas; others may have permanent status, while others are here illegally. While in this country, aliens are subject to all of our criminal laws.

If you arrest an alien, you should ask if the alien wishes you to notify the appropriate consular or diplomatic officers of the appropriate country. If requested, you should notify them, or allow the alien to do so, as a matter of course. Note, however, that some of our treaty obligations with foreign countries require that their diplomatic officials be notified whenever one of their nationals is arrested in our country. To locate the nearest embassy or consulate, or to learn the status of a particular individual, call the

Department of State at the telephone numbers given above, and fax them a copy of your report and any other relevant information about the arrest.

Members of Congress

Members of Congress are privileged from arrest during their attendance at sessions of Congress and while going to and returning from such sessions. U.S. Constitution, Art. I, Sec. 6.

a. Only a reasonable amount of time for travel is allowed.
b. This is a privilege, not an immunity, which means the arrest may be delayed or postponed until such time as Congress has recessed, plus travel time.
c. Serving of a subpoena on a member of Congress requiring an appearance and testimony is not an arrest. However, a member of Congress may not be arrested during this period for failing to comply with the subpoena.
d. The privilege ends when the member of Congress leaves office, i.e., retires quits, resigned or is expelled.

The Constitution states that members of Congress are privileged from arrest except for, "Treason, felony or breach of the peace." The term "breach of peace," has been defined by Black's Law Dictionary as follows:

A violation or disturbance of the public tranquility and order. The offense of breaking or disturbing the general peace by any riotous, forcible, or unlawful proceeding. Breach of Peace is a generic term and includes all violations of public peace or order and acts tending to a disturbance thereof. One who commits a breach of the peace is guilty of disorderly conduct, but not all disorderly conduct is a breach of the peace.

An International Driver's Permit?
By Shawn M. Herron

In recent months, Kentucky officers making traffic stops have reported that the drivers have presented them with "International Driver's Permits," "International Driver's Licenses" or similar documents. What are these documents and do they give the holder permission to drive in Kentucky?

The answer is no. International Driver's Permits are, in fact, legitimate documents, used worldwide, but an IDP does not, in and of itself, give the driver the authority to drive in the United States.

In 1950, the United States ratified the international Convention on Road Traffic[92], which was intended to promote "the development and safety of international road traffic by establishing certain uniform rules." This convention established certain basic safety rules for vehicular and animal traffic throughout the signatory countries. Of particular interest to Kentucky law enforcement officers, however, is Article 24, which addresses the type of documentation that a driver must have outside their own country, and in particular, the issuance of an "international driving permit" (IDP). The essential purpose of this document is to translate the critical information on an individual's operator's license into a variety of common world languages, such as English, Russian, Chinese, Spanish, Italian, Japanese, French, German and Arabic. The permit is not itself a license to drive.

Recently, a number of Internet sites have offered for sale International Driving Permits (also referred to as an International Driver's License, or other variations on the terminology). Some of the sites do indicate that the IDPs are not for use in the home country, the United States, while others are not so scrupulous. In fact, some purport to sell IDPs from other countries, such as Honduras, which would then appear to be valid for use in the United States. In some instances, these companies are deceptive in representing what an IDP permits a driver to do. Many advertise the IDP as a way to avoid having a state operator's license, and as a "legal" alternative if one's state license is revoked or suspended for any reason.

In the United States, only the American Automobile Association (AAA) and the National Automobile Club (NAC) are authorized by the U.S. Department of State to issue the IDP to U.S. citizens. A U.S. citizen must provide two passport-sized photos, their valid state license, a $10 fee and must complete an application. This can be done by mail or in person at any AAA or NAC office. (Some offices will take the photographs if the applicant does not provide them, for an additional fee.) U.S. permits are limited in validity from one year of the date of issue. (Individuals traveling overseas for an extended period may also renew them by mail.) However, as stated above, a U.S.-issued IDP is not valid in the United States. Each country sets the standard for the issuance of IDPs to their own citizens.

Nonresidents are permitted to drive in Kentucky on their home state or country operator's license if their own state or country accords similar privileges to Kentucky residents. (A nonresident alien whose home country does not license drivers may drive in Kentucky for no more than thirty days in any one year in the state.)[93] Kentucky does not require a foreign visitor to present an IDP, although certainly the information provided on the IDP may be useful if the original operator's license is not in English. However, a foreign visitor may not drive only on the IDP, it must be accompanied by an operator's license from the driver's home country, if the home country in fact issues operator's licenses, as virtually all countries now do. In other words, the IDP and the operator's license must match; the same country must issue them both. A citizen of Kentucky, or a non-resident who is a United States citizen, may not drive on an IDP, as an IDP has no validity in the home country of the driver. In other words, a U.S. citizen who is not a resident of Kentucky must present a valid operator's license from their home state to be considered a legal, licensed driver in Kentucky.

Failure by any United States citizen or foreign national (who is not resident in Kentucky) to present a valid operator's license from their home state or country of residence should result in a citation (at least), for "No Operator's License," a violation of KRS 186.410. (Certainly a foreign national whose home country does not officially license drivers may present this information in court as a defense.) Residents of Kentucky, whether a U.S. citizen or foreign national, are required to obtain a Kentucky operator's license, and failure to do so is also a violation of the law. Current college students who also carry appropriate student identification are exempted from this provision, and may continue to drive on their original operator's license. All persons driving in Kentucky are required to follow the motor vehicle laws of the Commonwealth.

[92] Geneva, 1949, ratified by the U.S. August 17, 1950.

[93] KRS 189.430.